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AN HISTORICAL EXAMINATION OF THE DEVELOPMENT OF LEGAL CLAIMS TO THE CONTINENTAL SHELF

by

© PANAYIOTIS MESARITIS

A THESIS
SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH
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OF MASTER OF LAWS

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SPRING, 1979

THE UNIVERSITY OF ALBERTA

FACULTY OF GRADUATE STUDIES AND RESEARCH

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Date 18 April 1979

DEDICATED TO MY PARENTS

ABSTRACT

The post-World War II expansion of national jurisdiction over submarine areas beyond the limits of the territorial sea, usually referred to as the continental shelf, was a radical change in the international law of the sea which came as a response to the emergence of a whole area of intense national interest. The continental shelf, and virtually the whole ocean space, which occupies an area twice as large as that of the emerged land of the earth, forms the last and greatest resource reserve of our planet. The ever increasing demand for energy and food resources in the face of a world wide population explosion and intensification of industrialization, and recent technological progress in marine engineering led to the utilization of submarine areas previously valueless or inaccessible to sustained economic activity.

The assumption of national jurisdiction over the continental shelf foreshadowed the more recent trends towards the recognition of special interests and preferential rights to the coastal state concerning the protection and enjoyment of the wealth of its adjacent seas, which are discernible in the recent establishment of fisheries zones, the enforcement of anti-pollution measures on the high seas and the widespread idea for the establishment

of a 200-mile economic zone. These developments created inroads into hitherto free maritime spaces, which were considered accessible to all by virtue of the principle of the freedom of the high seas, and have, therefore, a direct bearing on the rights of third states and on the legitimate interests of the international community at large.

The focus of the present thesis will be the genesis, formation and application of the law of the continental shelf and its accommodation with the traditional law of the sea. After a brief reference to the geographical origin and the legal connotation of the term "continental shelf" in Chapter I, a historical review of various state claims to submarine areas adjacent to the coast is attempted in Chapter II. An examination and analysis of the state practice on the continental shelf, from which the basic law on the subject was generated, will follow in Chapter III. Chapter IV will be devoted to the examination of the resources of the continental shelf and particularly of its living resources and their legal status. Chapter V will deal with the evolution, crystallization and application of the basic law of the continental shelf, both customary and conventional, and will conclude with an examination de lege ferenda. The problem of the delimitation of the continental shelf between neighbouring states will be dealt with in Chapter VI. Chapter VII will be devoted to the examination of the legal regime of the seabed beyond the limits of present national jurisdiction. An overall evaluation of the institution of the continental shelf within the context of the international law of the sea will be attempted in Chapter VIII, which will conclude with some final remarks.

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Qui si mos hodieque obtineret, ut humani nihil a se alienum homines arbitrarentur, profecto orbe non paulo pacatiore uteremur; refrigesceret enim multorum audacia, et qui iustitiam utilitatis causa nunc negligunt, iniustitiam damno suo dediscerent.

Hugo Grotius, Mare Liberum, p. 6 (1609).

If today the custom held of considering that everything pertaining to mankind pertained also to one's self, we should surely live in a much more peaceable world. For the presumptuousness of many would abate, and those who now neglect justice on the pretext of expediency would unlearn the lesson of injustice at their own expense.

Hugo Grotius, The Freedom of the Seas, p. 6, (1609).

CHAPTER I

INTRODUCTION

The term "continental shelf" is employed by geographers to denote the submarine prolongation of the continental or insular mass outwards into the sea. One of the outstanding features of the seabed relief is the regularity of the phenomenon of discontinuity between the continents and the abyssal ocean depths. Continents do not terminate precipitously at the sea shore, nor always at a small distance therefrom, but between the continental heights and the oceanic depths there is frequently a gradually tapering plain which may cover a considerable distance seawards, declining gradually until the superjacent waters reach an approximate depth of 200 meters, before sloping abruptly toward the oceanic depths.

To define the seaward limit of the continental shelf satisfactorily from the geographical and oceanographical standpoint, the water depth at the point where the continental shelf steepens abruptly should be used, but that varies quite considerably. Conventionally the outer edge of the continental shelf is taken at a depth of 200 meters but instances are known where the increase of declivity occurs at more than 400 or less than 100 meters. According to one view the only accurate method of defining the continental shelf is to consider it as lying between the shore and the first substantial fall-off of the seabed toward the ocean depths.[1]

The continental shelf is not uniformly distributed around the world. Its width may vary from a few hundred meters, as in the case of some Pacific islands, to 800 miles, as off the coast of Siberia. Its average width is forty miles. In some cases the continental shelf may be completely lacking as in the western coast of Corsica and off the Alpes Maritimes on the south-east coast of France. Broad continental shelves exist off the Atlantic coast of Canada and particularly off the coast of Newfoundland, where the shelf reaches a seaward distance of 250 miles from the coast. Similarly extensive continental shelves surround the British Isles, Australia, and the central and western Indonesian islands.[2]

At the outer edge of the continental shelf a marked increase of declivity occurs, ranging from three to forty-five degrees. The seabed in this area is called the "continental slope" and has a width varying from ten to forty-five miles. The foot of the continental slope reaches a depth of 4,000 to 5,000 meters and marks the boundary between the low-density rocks of the continents and the high-density ones of the deep ocean floor. In some instances the continental slope does not reach the ocean floor but is joined with an intermediate zone, known as the "continental rise" - a "gently dipping surface underlain by an apron of erosional debris derived from the continent and extending from the slopes onto the adjacent abyssal plains of the ocean basins."[3]

---

[1] Jacques Bourcart, Géographie du fond des mers. Étude du relief des océans, p. 130, (Paris, 1949). See also S. Whittemore Boggs,"Delimitation of Seaward Areas Under National Jurisdiction", 45 Am. J. Int. L. 240, at 245, (1951).

[2] J. A. C. Gutteridge, "The Regime of the Continental Shelf", 44 Transactions of the Grotius Society 77, at 80, (1958-1959). See also 4 Whiteman, Digest of International Law, pp. 817, 821.

The continental rise generally reaches the ocean floor at a depth of 4,000 to 5,000 meters and may extend as much as 600 miles seaward from the end of the continental slope. This area is particularly well developed off major river deltas and covers nearly 5.3 per cent of the whole seabed area. The term "continental margin" is usually employed to denominate the seabed area comprising the continental shelf, the continental slope and the continental rise.[4]

The continental shelf has come to gain strong legal signifigance after World War II as a result of technological progress and the search for new mineral deposits. The economic signifigance of the continental shelf as a source of minerals, and particularly oil and gas, as well as its importance as the habitat and feeding ground of most fish species, and the technological feasibility of large scale offshore mining and oil drilling prompted the grave concern of coastal states, which proceeded to assert sovereign rights to their continental shelves during the period after 1945. The assertion of national claims over the continental shelf brought into the fore the question of its legal status. Since these claims extended beyond the limits of the territorial sea, important international law problems were posed. These involved mainly the justification of the asserted rights, their nature and extent, and their accommodation with the traditional law of the sea.

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[3] V. E. McKelvey and Frank W. H. Wang, World Subsea Mineral Resources, p. 5, (Washington D.C., 1969).

[4] National Petroleum Council, Petroleum Resources of the Ocean Floor, pp. 24, 105, (Washington D.C., 1969). See also Report on Marine Science and Technology, (presented to the United Kingdom Parliament in April 1969, and published as Cmnd. 3992), Annex D, p. 51.

From the standpoint of international law the continental shelf is deemed to begin at the outer limit of a coastal state's territory and it would, therefore, appear that a legal definition of the continental shelf would not comprise the submarine areas underlying the territorial sea, which form an integral part of the coastal state's territory. In view of the varying configurations of the geographical continental shelf and its different widths and geomorphological structures, a legal definition of the continental shelf corresponding to its geographical prototype would not be satisfactory. For it would mean that coastal states which do not have a continental shelf in the geographical sense would be deprived of any rights to their adjacent submarine areas. It is not, therefore, surprising that in his Report on the High Seas the special Rapporteur of the International Law Commission noted in 1950 that

> (i)t must be considered whether the grant of special rights in respect of the mineral resources of the subsoil as well as marine resources should be made conditional upon the existence of a continental shelf. It is undeniable that this will lead to discrimination against those countries which have no continental shelf or whose continental shelf does not strech beyond the limits of their territorial waters...It must be born in mind that the adoption of a depth line of 100 fathoms (200 meters) as the outer limit of the continental shelf is likely to allot to the various States portions of the high seas varying greatly in extent. This would establish an unjustifiable inequality between states.[5]

In some state decrees and proclamations by which rights to the continental shelf have been asserted, the expression "continental shelf" is no more than a general indication of title to submarine areas of indeterminate extent. This, however, should not lead to the conclusion that the geographical concept of the continental shelf was of no importance for the development of the theory and the law on the subject. For it supplied a graphic description of the geographical unity between the submarine areas of the adjacent sea and the land territory of the coastal state, which played an important role in the formative period of the coastal state's rights over its continental shelf. Furthermore, it facilitated the assertion of state claims over adjacent submarine areas by giving these areas the authority of a natural geographical phenomenon closely interlinked with the land territory of the coastal state, and by providing the basis to claim that the assertion by the coastal state of sovereignty to its adjacent submarine areas can be held valid in law "by virtue of its sovereignty over the land, and as an extension of it".[6]

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[5] J. P. A. Francois, Report on the High Seas, U.N. Doc.A/CN.4/17, pp. 39-40, (17 March, 1950).

For the reasons cited above, a legal definition of the continental shelf should not be bound by its geographical connotation. It would appear that a fixed distance from the coast would be the most appropriate criterion to delimit the outer limit of the legal continental shelf, for which a proper term would be "the submarine areas adjacent to the coast".

State claims to the continental shelf were initiated by the Proclamation of the President of the United States, issued on September 28, 1945,[7] which was the starting point for a series of proclamations and decrees by Latin American and other countries. The American Proclamation declared that

> ...the Government of the United States regards the natural resources of the subsoil and the

---

[6] North Sea Continental Shelf Cases, (1969) I.C.J. Rep. 3, at 22.

[7] Presidential Proclamation 2667, September 28, 1945: Natural Resources of the Subsoil and Sea Bed of the Continental Shelf; 10 Federal Register 12303; 59 Stat. 884.

> seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.[8]

This Proclamation will be examined in some detail in Chapter III. Suffice it to note at present that its underlying philosophy, namely the assumption that the continental shelf belongs to the coastal state *ipso jure*, which is usually referred to as the continental shelf doctrine, forms the cornerstone of the whole continental shelf theory and has played a decisive role in the evolution and formation of the *lex lata* of the continental shelf.

Besides examining the law of the continental shelf *de lege lata* and *de lege ferenda*, the present thesis will endeavour to demonstrate that the recognition of preferential rights to the coastal state with respect to the conservation and enjoyment of the wealth of its adjacent seas and, particularly, the assumption by the coastal state of sovereign rights over its continental shelf for the purpose of exploring it and exploiting its natural resources, as well as the proposed assumption of control and jurisdiction over the seabed beyond the limits of the continental shelf by an International Seabed Authority, which will conduct the exploitation of this area on behalf of the community of states, can be reconciled and accommodated with the traditional law of the sea.

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[8] Ibid., final paragraph.

In this respect,it will be submitted that the initiation of measures for the conservation of the living resources of the high seas and the activities regarding the exploration and exploitation of the seabed underlying the high seas do not violate the reasonable emanations of the principle of the freedom of the high seas. On the contrary, it will be shown that this latter principle is not impervious to the growing needs of the international community and that it can still serve a useful purpose in balancing the exclusive rights of the coastal state with the general interests of the international community and in contributing to the preservation of a viable order on the high seas, by safeguarding a harmonious co-existence of the multiple uses of the high seas.

This principle's further usefulness will depend on the degree of its flexibility and adaptability to the realities of modern international relations and on the extent of its emancipation from its rigid historical background. It should be born in mind that when this principle came to full fruition in the 19th century it was mainly concerned with the freedoms of navigation and fishing, while the present competing uses of the seas were not faced as practical possibilities.

CHAPTER II

HISTORICAL BACKGROUND OF THE CONTINENTAL SHELF

1. First Claims over the Natural Resources of Submarine Areas adjacent to the Coast. Sedentary Fisheries.

Prior to World War II economic interest in the resources of submarine areas adjacent to the coast seems to have been minor and sporadic. The first assertions of rights over such areas were limited to specific claims to exclusive rights over particular resources of the seabed in limited areas on the basis of long enjoyment or at least of actual exploitation. Some of the best known were claims over various pearl, oyster and sponge fisheries, which are commonly known as sedentary fisheries, in contradistinction to free-swimming fish. Similarly, rights over mineral resources have been asserted, in case where mine shafts sunk ashore were driven seawards through the subsoil to points beyond the limits of territorial waters.[9] Such claims were substantiated in law on the basis of effective occupation of the particular areas mined.

During the 19th century, when a dispute broke out between the Crown and the Duchy of Cornwall as to the ownership of minerals won from workings underlying the waters off the coast of Cornwall, it was agreed to refer the question to the arbitration of Sir John Patteson, who decided that the right to all mines and minerals lying below low water mark under the open sea adjacent to the County of Cornwall but not forming part of it was vested in Her Majesty the Queen "in right of her Crown". On recommendation of the arbitrator that effect should be given to his award by legislation, the Cornwall Submarine mines Act of 1858 was in due course enacted, which provided that the aforesaid mines and minerals are "part of the soil and territorial possesions of the Crown".[10]

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[9] For example, off Durham and off Chile. See 1 Gilbert Gidel, Le Droit International Public de la Mer, p. 510, (Paris, 1932).

This issue is reminiscent of similar disputes in the United States and in Canada concerning the rights of the Federal Governments and the coastal States and Provinces respectively in the submarine areas off their shores.

In United States v. California[11] the Supreme Court of the United States held that the Federal Government rather than the State of California has control and jurisdiction over the seabed underlying the territorial sea off the coast of California. A similar result was reached in United States v. Louisiana[12] and in United States v. Texas.[13] By the Submerged Lands Act, however, which was enacted in 1953, dominion was granted to the coastal States over the seabed within the 3-mile limit.[14] The Outer Continental Shelf Lands Act,[15] which was enacted the same year, declared that the seabed beyond the 3-mile limit appertains to the Federal Government, subject to its jurisdiction, control and power of disposition.[16] The paramount rights of the Federal Government over the seabed beyond the 3-mile limit were further confirmed by the Supreme Court in United States v. Maine et al.[17]

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[10] The story of the legislation of the Cornwall Submarine Act of 1858 is reported in Regina v. Keyn, 2 L.R. Exch. 63, at pp. 157-159 and 199-201. (1876).

[11] 332 U.S. 19, (1947).

[12] 339 U.S. 699, (1950).

In Canada, by an Order-in Council dated April 26, 1965,[18] the Supreme Court was asked to pronounce upon the question as to whether British Columbia or Canada had jurisdiction and ownership over the seabed both within and without the 3-mile limit of the territorial sea. In Reference Re Ownership of Off-Shore Mineral Rights[19] the Supreme Court found that Canada had imperium and dominium over the seabed in question and that there was no historical, legal or constitutional basis upon which the Province of British Columbia could claim the right to explore and exploit the seabed both within and beyond the 3-mile limit, or claim legislative jurisdiction over the resources of these areas.

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[13] 339 U.S. 707, (1950).

[14] 67 Stat. 29; 43 U.S.C. par. 1302.

[15] 67 Stat. 462; 43 U.S.C. par. 1331.

[16] Ibid., section 3; Ibid., par. 1332(a).

[17] 420 U.S. 515, (1975).

[18] P.C. 1965-750.

In the decision of the Madras courts in Annakumaru Pillai v. Muthupayal[20] it was shown that the Palk's Bay in the south-east coast of India and parts of the Gulf of Manaar in the north-west coast of Ceylon had been occupied for centuries by the inhabitants of India and Ceylon for the purpose of fishing chanks and pearl-oysters, which had always been the monopoly of the sovereign. State licences were required for such fishing operations in the area. It was also noted in this decision that these fisheries passed from sovereign to sovereign, until about the end of the 18th century or the beginning of the 19th they were handed down to Britain. In a historical examination of these fisheries it was stated that there were references to pearl fishing in the area as early as the 14th century, while in 1700 the Dutch were granting licences to fish. It was further noted:

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[19] 65 D.L.R.(2d) 353, (1968); (1967) S.C.R. 792.

[20] 27 Indian L. R. (Madras) 551, (1904).

> Considering that the various European maritime powers, who from about the sixteenth century were contending for supremacy in the Indian seas, raised no question as to the right of the sovereigns for the time being of the Carnatic and Ceylon to their respective fisheries, there can be little doubt that such right was regarded by one and all of them as unassailable.[21]

A similar view was expressed in a Foreign Office statement in the House of Commons on May 30, 1933, in regard to the pearl fisheries of Ceylon:

> Pearl fisheries stand on a different footing to the ordinary kind of fishing in the waters of the sea, because the banks where the pearl oysters lie must be treated as part of the bed of the sea. For many centuries the pearl banks off the coast of Ceylon have been claimed as subject to the sovereignty of the rulers of the neighbouring territory and subject therefore also to their control. Some of these banks are more than three miles from the shore, but where they are situated under the high seas, the claim to sovereignty and control is limited in extent to the area of the banks, and does not affect the rights of navigation or of ordinary fishing in the waters over the banks.[22]

In his reference to the pearl fisheries of Bahrein and Ceylon in his work Droit des Gens, Vattel seems to accept the view that exclusive rights over sedentary fisheries adjacent to the coast can be held valid in law on the basis of contiguity and actual exploitation, noting that "(t)he Nation to which the shore belongs may claim for itself an advantage...within its reach and may make use of it, just as it has taken possession of the lands which his people inhabit."[23] He further asks: "Who can doubt that the pearl fisheries of Bahrein and Ceylon may be lawful objects of ownership?"[24]

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[21] Ibid., p. 566.

[22] 163 Hansard, cols. 1417-1418.

[23] Book I, p. 107, (1758), Carnegie translation, (1916).

Relevant to sedentary fisheries is also the Sea Fisheries Act of 1868, by which authority was granted to issue Orders-in-Council vesting the Irish Commissioners with the power to regulate oyster fishing on any beds in an area extending up to twenty miles seawards from a straight line drawn between Lambay Island and Carnsore Point.[25] About 1,300 square miles of this area form part of the high seas.[26]

Similarly, the Convention between Great Britain and France relative to Fisheries, of November 11, 1867, regulates oyster fishing off the coast of France and reserves a large area of oyster banks, extending much beyond the 3-mile limit, exclusively to French Fishermen.[27]

In Western Australia certain Acts on sedentary fisheries apply far beyond the 3-mile limit of the territorial sea. Thus, the Western Australia Pearl and Beche-de-mer Fishery (Extra-Territorial) Act of 1889, and the Pearling Acts, enacted between 1912 and 1965,[28] prohibit pearl and beche-de-mer fishing without license. Section 11 of the Pearling Acts provides that only diver's license can be granted to any person who is not a natural born or naturalized British subject, which means that ship licenses for pearl fishing are reserved for British subjects. Section 5 delimits the "Tropical Waters of Western Australia", where all pearl fishing operations are subject to the provisions of the Acts, to include large areas of the high seas.

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[24] Ibid.

[25] 31, 32 Vict., c. 45, s. 67.

[26] Cecil Hurst, "whose is the Bed of the Sea?", 4 Br.Y.In.L. 34, at 41, (1923-24).

[27] 135 Parry, The Consolidated Treaty Series 473.

[28] 45 Western Australia Reprinted Acts 1.

Similar legislation has been enacted by Queensland. The Queensland Pearl-Shell Fisheries Acts of 1811 and 1931,[29] and the Queensland Pearl-Shell and Beche-de-mer Fisheries (Extra-Territorial) Act of 1888[30] require licenses for pearl-shell and beche-de-mer fishing. The latter Act delimits "Australian waters adjacent to Queensland" to include large expanses of the high seas. In a report of the American Consul General to the Department of State, of September 17, 1923, it was noted that the official boundaries of the State of Queensland "now extend to the coast of Papua, a distance of over 100 miles from the Australian coast."[31] Like the respective legislation of Western Australia, section 2 of the Queensland Pearl-Shell Fisheries Act of 1898 provides that future fishing licenses shall be granted only to British subjects and corporate bodies established under and subject to British law.

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[29] 3 The Public Acts of Queensland 543.

[30] Ibid., p. 616.

[31] 2 Hackworth, Digest of International Law, 678.

The assumption of jurisdiction by the coastal state over sedentary fisheries beyond the limits of the territorial sea seems to have been accepted in theory. Following the aforementioned view of Vattel on the pearl fisheries of Bahrein and Ceylon Sir Cecil Hurst noted in 1923:

> Wherever it can be shown that particular oyster beds, pearl banks, chank fisheries, sponge fisheries or whatever may be the particular form of sedentary fishery in question outside the three-mile limit have always been kept in occupation by the Sovereign of the adjacent land, ownership of the soil of the bed of the sea where the fishery was situated may be presumed, and the exclusive right to the produce to be obtained from these fisheries may be based on their being a produce of the soil. Ownership of the soil by the Sovereign of the country under such circumstances must carry with it the right to legislate for the soil so owned and for the protection of the wealth to be derived from it and no doubt need be felt as to the binding force of the various enactments which have been issued for the protection of these sedentary fisheries outside the three-mile limit.[32]

However, in a view expressed twenty-five years later the same writer stressed that he did not consider his arguments concerning the legal justification of asserted claims over sedentary fisheries adjacent to the coast but lying beneath the high seas as being applicable in the case of claims over the continental shelf as a whole, for three reasons:

> The first is the magnitude of the areas of the Continental Shelf as compared with the small extent of the banks or beds where these sedentary fisheries exist; the second is the variety of the resources capable of being obtained from these submarine areas; and the third is the

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[32] Supra n. 26, p. 40.

> impossibility of obtaining some of them without the erection of installations which would be a serious hindrance to navigation.[33]

Exclusive rights over sponge fisheries on a bank off the coast of Tunis beyond the limit of the territorial sea had been claimed by the Bey of Tunis, who based his claims on continuous and unquestioned enjoyment of the produce of this submarine area.[34] Protests against the lease of sponge fisheries in this area were initiated in 1875 by a Greek captain and a French merchant, who invoked the principle of the freedom of the seas, but by judgment of their respective consuls their claims were dismissed.[35] Similarly, Italy claimed exclusive rights over the coral beds off the coasts of Sicily and Sardinia, well beyond the limit of the territorial sea.[36]

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[33] Cecil Hurst, "The Continental Shelf", 34 Transactions of the Grotius Society 165, at pp. 165-166, (1948).

[34] Supra n. 26, p. 41.

[35] 1 Gilbert Gidel, Le Droit International Public de la Mer, p. 492, (Paris, 1932).

[36] Thomas W. Fulton, The Sovereignty of the Sea, p. 697, (1911).

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2. First State Interest in the Continental Shelf.

The importance of the continental shelf as the habitat and feeding ground of most fish species and the high concentration of fish in the waters overlying the shelf stimulated the first state interest on the subject. Although mineral resources and especially oil have recently given a new impetus to discussions on the continental shelf and have raised urgent problems concerning its delimitation between neighbouring states, its old connections with fisheries are not completely severed.

As early as 1910, a Portuguese decree prohibited fishing by trawling in the waters overlying the continental shelf of Portugal within the "bathymetric line of 100 fathoms"[37] As it was pointed out in the preamble "deep trawling at depths of under 100 fathoms within the limits of the continental shelf is extremely harmful to fisheries, because this method destroys the feeding grounds on the sea bed and therewith the young fry feeding, sheltering and developing there".

In the Portuguese report to the Council of the League of Nations, prepared in 1927, it was proposed that the territorial waters be extended to include the whole continental shelf in order to secure exclusive enjoyment of fishing rights for the coastal population, as well as to take the necessary steps for the protection of fish. The report further refers to a Portuguese Memorandum, prepared in 1921, which discusses the necessity of protection of fisheries and notes that the coastal state is unable to enforce its regulations outside territorial waters, where most important fisheries are to be found.[38]

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[37] 1 U.N. Legislative Series, Laws and Regulations on the Regime of the High Seas, (I): Continental Shelf, p. 19, Article 2.

The same views were reiterated at the League of Nations Codification Conference of 1930, where the Portuguese delegate pointed out the reasons which, in his view, rendered the expansion of the Portuguese territorial waters necessary:

> On the one hand,Portugal has a very narrow continental plateau, (and) on the other, this very fact induces foreign fishermen to go there, so that the Portuguese are in a very critical position, unless they can have a monopoly of fishing within a belt of at least six miles.[39]

The proposal to extent the territorial sea to coincide with the area occupied by the continental shelf was first made at a fisheries conference in Madrid in 1916 by the Spanish Odon de Bruen, who adduced the argument that the continental shelf is the main habitat of the important edible species of fish.[40]

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[38] *Report to the Council of the League of Nations*, prepared by the Committee of Experts for the Progressive Codification of International Law, League of Nations Doc. C.196.M70.1927.II, p. 188.

[39] 3 *Acts of the Conference for the Codification of International Law*, League of Nations Doc. C.351(b). M145(b). 1930.V., p. 135, (Geneva, August 19, 1930).

[40] Cited in League of Nations Doc. C.196.M70.1927, p.63.

The abortive Report of the League of Nations Committee of Experts on the Exploitation of the Products of the Sea, drafted by the Argentine jurist Jose Leon Suarez in 1925, proposed that uniform regulations for the conservation of fisheries should be established by international action over the whole continental shelf.[41]

In the United States some proposals were made aiming to extend jurisdiction over the continental shelf and the superjacent waters off the coasts of Alaska. In 1935 a Bill for the protection of the salmon fisheries off the coasts of Alaska was introduced in the United States Congress. The Bill, which passed only the Senate and never became a law, declared that the shallow depths of the Bering Sea must be regarded as a slightly submerged margin of the American continent and recited the need to protect mineral deposits, fisheries and animal life. It then purported to extend the jurisdiction of the United States to "all waters and submerged land adjacent to the coasts of Alaska...and lying within the limits of the continental shelf, the edge of such shelf having a depth of water of 100 fathoms more or less."[42] Although the theory of the natural prolongation of the continent towards the sea, which seems to underlie the Bill, was reiterated by the United States Proclamation on the continental shelf[43] ten years later and was decisive for the development of the law of the continental shelf, it did not find any support at that time. Philip Jessup wrote in 1939 that "the legal theory of the projected coast submerged beneath the waters of the sea, which seems to underlie the Copeland Bill, could scarcely be defended by the United States in an international controversy."[44]

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[41] 20 Am.J.In.L. 231, (special supp., 1926).

[42] Philip Jessup, "The Pacific Coast Fisheries", 33 Am.J.In.L. 129, (1939). The Bill was introduced by Senator Copeland.

By a decree issued in 1916, the Imperial Russian Government claimed certain Arctic islands, as forming "a northern extension of the Siberian continental platform."[45] This decree was confirmed and reissued by the Government of U.S.S.R. in 1924. According to one view, the term "continental platform" in this decree

> ...is clearly not used in the same sense as that employed today: It does not refer to an underwater plateau. The rights claimed...in polar waters should...be considered in relation to the "theory of sectors"...The Soviet Government has not submitted any claims on the basis of the continental shelf theory, nor has it replied to the claims of other states.[46]

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[43] Supra, n. 7.

[44] Supra, n. 42, p. 135.

[45] W. Lakhtine, "Rights over the Arctic", 24 Am. J. Int. L. 703, at 708, (1930).

[46] J.P.A. Francois, Report on the High Seas, U.N. Doc. A/CN4/17, p. 34, (1950).

It has been suggested by one commentator that the Russian decree of 1916 was the first state instrument to introduce the continental shelf notion in international law. According to the same view, the use of the term "continental platform" suggests that a claim on the continental shelf is made,

> otherwise...(it) has to be interpreted as referring to the territorial plane of Siberia, which would be an unusual interpretation. Besides the idea is the same. The plane continues under water and emerges again here and there, thus forming the islands referred to, which, therefore, belong to the plane.[47]

This view overlooks the fact that the Russian decree does not make any claims to the submarine areas themselves, but to some islands adjacent to the coast. It should be also noted that these claims to the islands are not made on the basis that such islands form the emerged points of the submarine areas adjacent to the Siberian coast, an argument which would prima facie indicate that reference was made to submarine areas.

It seems that the term "continental platform" refers to the Siberian continent and the claims to the islands appear to reflect the theory of contiguity as a title to territory. It should be also noted that no Soviet jurist has made any reference to the aforementioned decree, nor is it mentioned in the Edict on the Continental Shelf,[48] adopted by the Presidium of the Supreme Soviet of the U.S.S.R. on February 6, 1968, which is considered as the first example of Soviet legislation governing the legal status of the continental shelf, beyond the 12-mile limit of Soviet territorial waters.[49]

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[47] M. Mouton, The Continental Shelf, p. 241, (Hague, 1952).

[48] 7 International Legal Materials 392, (1969).

It is worthwhile noting that the proposal to extend the territorial waters to the outer limit of the continental shelf, for reasons of protection and control of coastal fisheries and in certain cases with an intended fishing monopoly on the part of the coastal state, implies in fact full sovereignty over the whole continental shelf underlying these waters, although it is not based on any ipso jure title of the coastal state.

Two things, however, seem to foreshadow the post-war developments with respect to the extension of the coastal state's jurisdiction over submarine areas adjacent to the coast and its resources. The first is the vastness of the submarine areas which under this proposal fall within the jurisdiction of the coastal state, virtually coinciding with the whole continental shelf in the geographical sense. The second is the increasing concern of coastal states for their marine resources which came to be regarded of the utmost importance for their economy.

So far as the continental shelf doctrine is concerned,[50] it should be noted that its roots are to be traced in the aforementioned abortive Bill on the fisheries off the coast of Alaska, of1935, which was the first document to introduce the idea of the natural prolongation of the adjacent land toward the depths of the sea. As it has been mentioned above the Bill considered the depths of the Bering Sea as a slightly submerged margin of the American continent and indicated the need to protect not only fisheries, but also mineral deposits. Although the Bill came to nothing, it may have influenced the United States Proclamation on the continental shelf of 1945, which was the first state instrument to adopt the continental shelf doctrine.[51]

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[49] W. E. Butler, "The Soviet Union and the Continental Shelf", 63 Am. J. Int. L. 103, (1969).

[50] Supra, p. 7.

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[51] This Bill, usually referred to as the Copeland Bill, was an indication of the great concern over possible depletion of the Pacific salmon fisheries, because of the activities of Japanese fishermen during the 1930's.

In 1937 President Roosevelt notified the Department of State that he was thinking of "an Executive Proclamation by the President with reference to the fisheries in the Pacific off the coasts of Alaska up to a water depth of 100 fathoms." In 1943 the Secretary of the Interior recommended to President Roosevelt that the Department of the Interior initiated a study laying the groundwork "for availing ourselves fully of the riches in the submerged land (the continental shelf extending some 100 or 150 miles from our shores) and in the waters over them." In 1944 the Assistant Secretary of State appointed a committee which was entrusted with the task of developing a formula for the protection of marine resources. The committee prepared several drafts of a governmental proclamation on the continental shelf which resulted in the Presidential Proclamation on the continental shelf of 1945. (4 Whiteman, Digest of International Law, pp. 752-757).

CHAPTER III

STATE PRACTICE ON THE CONTINENTAL SHELF

The extent and nature of state claims to submarine areas and the arguments which have been adduced for their legal justification can be better appreciated through an examination and analysis of state practice.

Already, in the period between 1942 and 1944 claims to the living resources of the continental shelf tended to be superseded by claims to its mineral resources, due to extensive research in an effort to discover raw materials to supplement rapidly decreasing world oil supplies.

Although the focal point of state practice on the continental shelf is the United States Proclamation on the continental shelf of 1945, the first claims to submarine areas adjacent to the coast date back in 1942, when the United Kingdom and Venezuela signed a treaty relating to the submarine areas of the Gulf of Paria.[52] Two years later, Argentina issued an executive decree[53] proclaiming sovereignty over both the continental shelf and the waters above. Reference to this decree was made in a later decree of the President of the Argentine Republic, issued on October 11, 1946, where it was described as "a categorical proclamation of sovereignty over the Argentine Continental Shelf and the Argentine Epicontinental Sea, declaring them to be transitory zones of mineral reserves."[54]

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[52] 205 L.N.T.S. 121.

[53] Decree No. 1386/44, Boletin Oficial, March 17, 1944.

The aforementioned treaty between the United Kingdom and Venezuela of February 26, 1942, provided for the division between the parties of the submarine areas of the Gulf of Paria beyond territorial waters.[55]

The Gulf of Paria is a large marine area between Trinidad and Venezuela extending up to 80 miles from east to west, and 50 miles from north to south, and is not normally used by international shipping. By Articles 2 and 3 of the treaty each of the contracting parties undertook the obligation "not to assert any claims to sovereignty or control" over those parts of the submarine areas which lay on the other side of a line drawn according to Article 3, and to "recognize any rights of sovereignty or control which have been or may hereafter be lawfully acquired" by the other party. It may be noted that the treaty does not explicitly provide for the actual division of the submarine areas, but imposes on the parties a mutual obligation not to assert claims to the areas designated for the other party and to recognize any sovereign rights which that party has or may acquire in the future.

It may be implied that each party intended to assert sovereign rights over the submarine areas lying on his own side of the line. It appears then that the parties looked forward to the legal occupation of parts of the seabed, and to this end they guarded against conflicts through a political pact establishing spheres of interest.

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[54] 41 Am.J.In.L. 11, (supp.), 1947.

[55] Supra, n. 52.

Indeed, after the conclusion of the treaty, the President of Venezuela proceeded to annex so much of this submarine area as lay on his side of the line and soon afterwards the King issued the Submarine areas of the Gulf of Paria (Annexation) Order, of August 6, 1942, by which the submarine areas designated for him were annexed.[56] This Order notes in its introductory recitals that "it is expedient that the rest of the submarine areas of the Gulf of Paria should be annexed", without offering any further legal justification for the annexation.

The treaty, in Articles 5 to 7, and the annexation Order, like all other subsequent state instruments staking out claim to the continental shelf, expressly discard any claims to territory above the surface of the high seas, or to any part of the high seas, and disclaim any intention to prejudice any rights of passage or navigation on the waters over the claimed submarine areas. It is also stipulated in Article 7 that each of the contracting parties shall take all practical measures to prevent the exploitation of the submarine areas from causing the pollution of the territorial waters of the other.

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[56] 1 United Kingdom Statutory Rules and Orders 919, (1942); 4 Whiteman, Digest of International Law 791.

Paradoxically, the United Kingdom did not see it fit to annex the submarine areas off the Bahamas three years later and only a few months before the promulgation of the American Proclamation on the continental shelf of 1945. Instead the Bahamas Legislature passed the Petroleum Act of 1945, which did not claim exclusive rights over the continental shelf but employed the technique of control of the continental shelf through control of shore facilities. It must be born in mind that exploitation of the seabed without some access to a conveniently located coast is uneconomic. The Act provided that leases and licences obtained by foreign companies could only be granted to nominee companies incorporated within the Bahamas. Consequently foreign companies had to acquire Bahamas nationality and thus be amenable to Bahamas jurisdiction in order to exploit the continental shelf off the Bahamas. Control of the continental shelf was thus made possible through extraterritorial control and jurisdiction over nationals.

Another example of such jurisdiction is the legislation of Florida concerning exploitation of sponge fisheries off its coasts in regard only to its citizens. This legislation was disposed of in 1941 by the Supreme Court of the United States in Skiriotes v. the State of Florida where it was pointed out that the State of Florida had the right to legislate outside its territory for its own citizens since "save for the powers committed by the Constitution to the Union, the State of Florida has retained the status of a sovereign."[57]

A similar decision was reached by the Supreme Court of Alaska in State of Alaska v. Bundrant. This case involved violation of various statutes and regulations of the State of Alaska relating to crabbing in the Bering Sea, both within and without the 3-mile limit. In its decision the Court went even further in holding that the regulations applied also to non-Alaskan citizens and noted that these regulations "do not amount to more than a proper and logical extension of the State's police power."[58]

The following state practice, manifested through proclamations, decrees and in certain cases through national legislation, will commence with the examination of the United States proclamation on the continental shelf which has led the way towards the establishment of the continental shelf doctrine. Then the practice of the Latin American countries will be considered. Since these countries have claimed rights both to the continental shelf and the waters overlying it, their claims will be examined in the light of the lex lata on the conservation of the living resources of the high seas and the recent establishment of fishing zones by unilateral state action. The practice of the United Kingdom after 1945 will also be considered. The examination of other state practice will follow in a chronological order with a view to pointing out the gradual acceptance of the continental shelf doctrine.[59]

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[57] 313 U.S. 69, at 77, (1941).

[58] 546 P.2d 530, at 556 (1976).

1. The Practice of the United States.

On September 28, 1945, the President of the United States issued a Proclamation on the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf.[60] In its first two introductory recitals the Proclamation pointed out "a long range world-wide need for new sources of petroleum and other minerals", and noted that according to the opinion of competent experts these resources "underlie many parts of the continental shelf off the coasts of the United States of America, and with modern technological progress their utilization is already practicable or will become so at an early date". The third recital cited the need for the assumption of recognized jurisdiction over these resources "in the interest of their conservation and prudent utilization".

In its fourth recital the Proclamation notes that "the exercise of jurisdiction over the natural resources of the subsoil and the sea bed of the continental shelf by the contiguous nation is reasonable and just", and adduces the following arguments in support of these assertion:

> (i) "(T)he effectiveness of measures to utilize or conserve these resources would be contingent upon cooperation and protection from the coast".

This seems to suggest that it is the nearest coastal state which has the possibility to control the continental shelf and, therefore, to assume an effective jurisdiction.

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[59] Supra, p. 7.

[60] Supra, n. 7.

> (ii) "(T)he continental shelf may be regarded as an extension of the land mass of the coastal nation and thus naturally appurtenant to it".

This geographical argument has proved to be of crucial importance for the development of the continental shelf theory. In pointing out that the continental shelf, as the submerged extension of the land territory of the coastal state, is naturally appurtenant to it, the Proclamation seems to imply that the continental shelf belongs to the coastal state *ipso jure* and that its acquisition is not contingent upon the existence of any legal title to territory.

> (iii) The resources of the continental shelf "frequently form a seaward extension of a pool or deposit lying within the territory" of the coastal state.

This appears to be an aspect of the geographical argument of the continuation of a coastal state's land territory towards and under the sea. In particular, this argument points out the need to protect mineral resources which might be tapped from the coast. As it was noted in a memorandum prepared by the Office of the Assistant Secretary of State on June 15, 1945, the assertion of control over operations off the coasts of the United States was considered necessary in order "to guard against the depletion of...mineral resources and to regulate, from point of view of security, the activities of foreigners in proximity to...(the) coast".[61] The considerations of security mentioned in this memorandum form the basis of the final argument:

> (iv) "...self protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources".

In its operative part the proclamation declares:

> ...the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.

The wording of this assertion indicates, prima facie, an intended appropriation of the actual resources and an assertion of jurisdiction over the seabed and subsoil of the continental shelf in respect only to the resources. This restriction of the claim to jurisdiction over the resources rather than over the submarine areas beyond the limits of the territorial sea themselves, may be due to the fact that most of the claims to submarine areas previously recognized in international law were claims to exclusive rights over particular resources and the Proclamation may have been so worded, as to conform with the established practice.

Another explanation might be that according to the Constitution of the United States a formal acquisition of territory requires legislative approval and cannot be accomplished by Presidential Proclamation. Express assumption of control and jurisdiction over the submarine areas themselves may have also been avoided in view of domestic controversies between the Federal Government and certain coastal States, concerning their respective rights over the seabed underlying the territorial sea, which were raging when the Proclamation was issued.[62]

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[61] 4 Whiteman, Digest of International Law, 754.

Another peculiarity of the Proclamation is that assumption of "control and jurisdiction" was preferred to assumption of"sovereignty". It seems that there is not any factual difference between the two terms, the former suggesting assumption of sovereignty, couched in a diplomatic language. In the opinion of Professor Brierly "if the littoral state had exclusive rights of control and jurisdiction over the subsoil, it would be regarded as enjoying sovereignty".[63] Sir Cecil Hurst further observes that "if the rights claimed over the continental shelf and its resources were called sovereignty, they would be no more extensive than what are claimed in the Proclamation."[64] It may be noticed that the Proclamation employs a language of studied restraint.

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[62] See supra, pp. 10-11.

[63] U.N. Doc.A/CN.4/SR.68, p. 8, (1950).

[64] Cecil Hurst, supra, n. 33, at 162.

While for reasons probably of Constitutional Law[65] and of attachment to consistency in its diplomatic practice the United States may have employed a terminology intended to dispel the appearance of assumption of sovereignty over the continental shelf, the letter and the spirit of the Proclamation indicate that it assumed powers which in fact can have no other result.

Before proceeding to the examination of the legal basis of the rights asserted in the Proclamation, it may be expedient to look into the meaning of the term "continental shelf" as employed in the Proclamation. In an accompanying press release issued by the Department of State it was noted that the Proclamation would

> ...make possible the orderly development of an underwater area of 750,000 square miles in extent. Generally, submerged land which is contiguous to the continent and which is covered by no more than 100 fathoms (600 feet) of water is considered the continental shelf.[66]

It would appear then that the Proclamation employs the term "continental shelf" in the geographical sense. As it was noted in a report of the Secretary of the Interior, issued a few months before the promulgation of the Proclamation,

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[65] The term "control and jurisdiction", although is in fact identical with the term "sovereignty", does not *prima facie* suggest the latter, which, if used, would indicate an act of acquisition of territory, which would need legislative approval.

[66] 13 Department of State Bulletin, p. 484, (1945).

> ...approximately described, the continental shelf is all of the ocean floor around the United States and its territories that is covered by no more than 600 feet of water. The whole area is almost as large as the area embraced in the Louisiana Purchase...and almost twice as large as the original 13 colonies...Along the Alaska coastline the shelf extends several hundred miles under the Bering Sea. On the eastern coast of the United States the width of the shelf varies from 20 miles to 250 miles, and along the Pacific coast it is from 1 to 50 miles wide.[67]

As regards the legal basis of the rights claimed in the Proclamation, it may be noted that the basic question to be answered is whether the claim of control and jurisdiction over the continental shelf is substantiated in law on the basis of any title to acquisition of new territory, such as occupation of a res nullius or contiguity.

(1) Occupation.

It has been suggested by a commentator that "the legal basis of the United States claims appears to be based on valid occupation of the shelf by the coastal state."[68] According to another view

> ...since occupation, to be valid, must be effective, the doctrine helps to keep within reasonable limits both the extent of the area

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[67] Annual Report of the Secretaty of the Interior for the Fiscal Year Ended on June 30, 1945, p. ix, (U.S. Government Printing Office, 1945).

[68] C. J. Colombos, The International Law of the Sea, (5th ed., 1962), p. 66.

> of the seabed which may reasonably be appropriated and the depth of seabed which may be treated as in law susceptible of sovereignty.[69]

The first view seems plausible in view of the fact that the advantageous location of the coastal state, compared with more remote third states, enables it to effectively occupy its adjacent submarine areas. In regard to the second view it may be noted that effective occupation in the case of the continental shelf need not be manifested through actual exploitation, any more than occupation of a *res nullius* in the case of dry land need be manifested through actual settlement. It should be born in mind that the effectiveness of occupation in the sense of "continuous and peaceful display of state authority"[70] has worn thin since the decisions in the *Island of Palmas*,[71] the *Legal Status of*

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[69] C. H. M. Waldock,"*The Legal Basis of Claims to the Continental Shelf*", 36 Transactions of the Grotius Society 115, at 140, (1951).

[70] *Island of Palmas* case, 2 U.N. Rep.Int.Arb. Awards 829, at 869.

[71] In this case Judge Huber held that the creation of a special administration by the Netherlands on the already inhabited by natives island of Palmas was not necessary for the purpose of bringing the island within the sovereignty of the Netherlands,but it would be enough if the Netherlands showed "a continuous and peaceful display of actual power".
(2 U.N. Rep.Int.Arb.Awards 829, at 857).

Eastern Greenland,[72] and the Clipperton Island[73] cases.

It should be noted, however, that even if the requirements for an effective occupation could be reduced to the promulgation of a mere proclamation by the coastal state, the theory of occupation would still not suffice to confer to the coastal state a secure and undisputed title to its continental shelf. For a third state could claim that it holds a title to the same continental shelf, more potent than the one held by the coastal state, and there would be no guarantee in such case that the latter state's title would prevail. Under the theory of occupation a third state's title based on actual exploitation of the submarine areas may prove superior than the coastal state's title which accrues from a mere proclamation. Moreover, any submarine areas which are not claimed by the adjacent coastal state would be considered as a res nullius capable of occupation by any third state.

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[72] In this case the Permanent Court of International Justice said:

> It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied very little in the way of actual exercise of sovereign rights, provided that the other state could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries. (P.C.I.J. Series A/B, No. 53, p. 45, (1931)).

The Court considered as a sufficient manifestation of Denmark's sovereignty over Greenland acts of Danish legislation concerning navigation in the seas around Greenland and some commercial agreements referring to Greenland. (Ibid. pp. 48-54).

[73] In this case it was held that

> ...if a territory by virtue of the fact that it was completely uninhabited, is, from the first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished and the occupation is thereby completed. (26 Am.J.In.L. 390, at 394 (1932)).

Such problems may arise, unless it is to be conceded that only the coastal state is entitled to occupy its continental shelf, which again would strongly suggest that the continental shelf belongs to the coastal state ipso jure, to the exclusion of other states. In other words, the coastal state would acquire the continental shelf, not as the first state to occupy the area, or as the one holding the most potent title accruing from occupation in the case of competing claims, but as the only state entitled to such occupation. Under this supposition, however, the theory of occupation need not even be invoked.[74]

(2) Contiguity.

The theory of contiguity has some affinities with the geographical argument of natural prolongation, which is advanced by the Proclamation, inasmuch as it indicates the continuity and unity of a claimed area in relation to the adjacent territory of the claiming state.

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[74] In its commentary to its first Draft of Articles on the continental shelf, prepared in 1951, the International Law Commission discarded the theory of occupation as a basis for the coastal state's rights over its continental shelf and held the view that such rights are independent of occupation, actual or notional, and of any formal assertion of these rights. (U.N. Doc. A/1858, (1951) I.L.C. Yearbook 141, at 142).

This theory obviates the necessity of prior occupation and prevents encroachment by more remote states in areas where the coastal state may justly be sensitive about its interests. It also takes account of the fact that there is an economic, political and geographical interrelationship between the coastal state and its adjacent submarine areas.

While the theory of contiguity may be novel as applied to submarine areas, it has not been unknown in international law in cases of claims over contiguous dry lands and islands, where such cognate concepts as proximity and continuity of territory have been used. Some conception of contiguity underlay the Colonial Charters in America which purported to grant jurisdiction from "sea to sea".[75] The Charter of Massachussetts Bay of 1628 purported to operate "from the Atlantick and Western Sea and Ocean on the east parte to the South Sea on the west parte."[76]

In connection to the Oregon controversy the United States Secretary of State wrote in 1844:

> That contiguity furnishes a just foundation for a claim of territory, in connection with those of discovery and occupation, would seem unquestionable.[77]

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[75] 1 Hackworth, Digest of International Law 408.

[76] 1 Moore, Digest of Inernational Law 265.

[77] Ibid., at 264.

A similar view was held in the British Guiana-Brazil Boundary Arbitration of 1904, where it was held that the effective possession of a part of a region confers a right to the acquisition of the sovereignty of the whole region, if it constitutes a single organic whole.[78] Some aspects of the contiguity theory also underlie the protocol of March 7, 1885, between Germany, Great Britain and Spain, by which the two former states recognized "the sovereignty of Spain over the places effectively occupied, as well as over those that are not yet so, of the Sulu Archipelago."[79]

Hall seems to accept the view that the occupation of the portion of the shore confers title to a proportional area of the interior territory. He notes:

> It has been generally admitted that occupation of the coast carries with it a right to the whole territory drained by the rivers which empty their waters within its line; but the admission of this right is perhaps accompanied by the tacit reservation that the extent of coast must bear some reasonable proportion to the territory which is claimed in virtue of its possession.[80]

In the Island of Palmas arbitration between the United States and the Netherlands, Judge Huber firmly rejected the claim that coniguity is a valid title to sovereignty over islands. He noted:

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[78] 99 British and Foreign State Papers 930, (1905-1906).

[79] 1 Moore, Digest of International Law 268.

[80] W. E. Hall, A Treatise on International Law, (8th ed., 1924), p. 130.

> Although states have in certain circumstances maintained that islands relatively close to their shores belonged to them in virtue of their geographical situation, it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a state from the mere fact that its territory forms the terra firma (nearest continent or island of considerable size). Not only would it seem that there are no precedents sufficiently frequent and sufficiently precise in their bearing to establish such a rule of international law, but the alleged principle itself is by its very nature so uncertain and contested that even governments of the same state have on different occasions maintained contradictory opinions as to its soundness.[81]

Referring to the value of the principle of contiguity as a title to territory in general, Judge Huber noted:

> Nor is this principle of contiguity admissible as a legal method of deciding questions of territorial sovereignty; for it is wholly lacking in precision and would in its application lead to arbitrary results...The title of contiguity, understood as a basis of territorial sovereignty, has no foundation in international law.[82]

This decision, however, cannot be taken to apply by analogy to submarine areas, as the problems encountered in the latter differ considerably, and so far at least conflicting claims do not exist. In this case the title from contiguity yielded to the more potent title of the

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[81] 2 U.N. Rep. Int. Arb. Awards 829, at 854. The award was handed down in 1928.

[82] Ibid., pp. 855, 869.

Netherlands, which acquired sovereignty to the island of Palmas "by continuous and peaceful display of state authority during a long period of time going probably back beyond the year 1700".[83] It should be also born in mind that the pronouncement on contiguity in this decision was an obiter dictum, since the claim of the United States in this case was not based mainly on contiguity. Philip Jessup notes in this respect that the United States did not invoke the basis of contiguity and that they were practically estopped from doing so by their opposition to it in the Lobos Islands controversy in the 19th century,[84] where they rejected the assertion of sovereignty over the Lobos islands by Peru, which invoked the principle of contiguity,and maintained that only"unequivocal acts of absolute sovereignty and ownership" can give title to territory..[85] The same view was maintained by the United States in its dispute with Venezuela over the ownership of the Aves island.[86]

It should be further noted that in the Anna case

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[83] Ibid., at 869.

[84] Philip Jessup, "The Palmas Island Arbitration", 22 Am. J. Int. L. 735, at 742, (1928).

[85] 1 Moore, Digest of International Law, pp. 265-266.

[86] Ibid., at 266.

Sir William Scott, in finding that the mud islands off the mouth of the Mississippi river belonged to the United States, relied in part on the principle of alluvium and increment, but he also took into account reasons of security and physical appurtenance. He noted:

> Consider what the consequence would be if lands of this description were not considered as appendant to the mainland, and as comprised within the bounds of the territory. If they do not belong to the United States of America, any other power might occupy them; they might be embarked and fortified. What a thorn would this be in the side of America.[87]

Lauterpacht holds the view that mere contiguity when confronted with effective occupation must yield to the latter as representing a superior title. But he notes that effectiveness of occupation may range from the requirement of intensive administration in every part of a claimed territory, to a mere state activity which is manifested by an authority situated in a narrowly circumscribed part of the claimed territory or even outside it, and points out that in cases where effectiveness of occupation is "reduced to the very shadow of its natural self" contiguity is a more potent factor. He further notes that the theory of contiguity in the case of adjacent submarine areas represents "the only solution consonant with convenience, economic necessities, and requirements of international peace."[88]

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[87] The Anna, 5 C.Rob.373, at 385. (1805).

[88] H. Lauterpacht, "Sovereignty over Submarine Areas", 27 Br. Y. Int. L. 376, at 429-430, (1950).

According to another view the contiguity theory in the case of the continental shelf serves a twofold purpose, in providing a legal link between the coastal state and the adjacent submarine areas, and in barring claims to areas not in fact associated with the land territory of the coastal state.[89]

It should be noted, however, that contiguity should be understood as denoting proximity in a general sense, and not as implying that submarine areas should be considered as appertaining to a particular coastal state if they are closer to it than they are to the coast of another. This is of particular significance in the case of the delimitation of the continental shelf between neighbouring states, where contiguity is only one of the factors which should be taken into account and not the single basic rule, the ultimate effect of which would be to apportion to a coastal state all submarine areas which are nearer to it than to any other. The International Court of Justice in its decision in the North Sea Continental Shelf Cases laid special emphasis on the geographical principle of the natural prolongation of the coastal state's land territory towards the sea, "via the bed of its territorial sea which is under the full sovereignty of that state",[90] and noted that the submerged land forms an extension of something already possessed. The Court further opined that nearness or proximity does not *per se* confer title:

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[89] Richard Young, "Legal Status of Submarine Areas beneath the High Seas", 45 Am. J. Int. L. 225, at 233, (1951).

[90] (1969) I.C.J. Rep. 3, at 31.

> Submarine areas do not really appertain to the coastal state because - or not only because - they are near it. They are near it of course; but this would not suffice to confer title, any more than, according to a well-established principle of law...mere proximity confers *per se* title to land territory. What confers the *ipso jure* title which international law attributes to the coastal state in respect of its continental shelf, is the fact that the submarine areas may be deemed to be actually part of the territory over which the coastal state already has dominion - in the sense that although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea.[91]

It would appear that neither occupation nor contiguity form the basis of the rights asserted in the United States Proclamation. It might be said that the Proclamation advances a new *sui generis* theory of contiguity according to which a title to sovereignty over the submarine areas is conferred exclusively to the coastal state, since no third state could claim sovereignty to these areas on the basis of any title. What it would rather appear to be the case is that the Proclamation advances a new doctrine, according to which adjacent submarine areas, although not precisely defined, are subject *ipso jure* to the sovereignty of the coastal state. As it appears from the Proclamation's introductory recitals, reasons of convenience and geographical,economic, political and security considerations urged the advancement of the new doctrine.

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[91] Ibid., at 31.

That the Government of the United States was aware that the Proclamation would be breaking new ground and that recognition by third states would be of primary importance for the advancement of the new doctrine is clear from certain expressions in the Proclamation, such as "recognized jurisdiction over these resources is required in the interest of their conservation and prudent utilization", and the "exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf is reasonable and just".

An implicit recognition of similar rights to other states over their continental shelves can be gathered from the operative part of the proclamation, where it is stated:

> In cases where the continental shelf extends to the shores of another state, or is shared with an adjacent state, the boundary shall be determined by the United States and the state concerned in accordance with equitable principles.

In a final proviso the Proclamation notes that the legal status as high seas of the waters overlying the continental shelf and the right to their free and unimpeded navigation are not affected.

It is noteworthy that although the Proclamation indicates complete willingness to discuss with any other state questions concerning the boundary of the continental shelf, it shows no willingness to discuss questions relating to the nature and extent of the asserted rights to the continental shelf. In this respect,there is sound basis in the view that

> (n)o-one can...read the Proclamation without feeling that it was intended to give notice to the world that so far as the Continental Shelf was contiguous to the American coast, the Government of the United States claimed, and intended to exercise, an exclusive right to develop its resources as, and when, and how it liked.[92]

2. The Practice of the Latin American Countries.

(1) Mexico

On October 29, 1945, the Pesident of Mexico issued a Proclamation, modelled on the American Proclamation on the continental shelf of the same year, which claimed "the whole continental shelf" adjacent to the coasts of Mexico and "all and every one of the natural riches, known or still to be discovered, which are found in it".[93] The Proclamation disclaimed any intention of interference with the freedom of navigation on the waters over the shelf. The continental shelf is defined in the Proclamation as the area delimited by a 200-meter isobath contour line.

In an amendment to the Mexican Constitution introduced in 1949, it was declared that "the continental shelf and the submarine bed, and also the waters covering these areas" are national property.[94] This claim to the waters above the shelf was probably an influence from other Latin American Proclamations which lodged claims over the shelf and the epicontinental sea. The interest of Mexico for the waters superjacent to its continental shelf is also evident from the comments of the Mexican Government on the provisional articles concerning the regime of the territorial sea, which were adopted by the International Law Commission in 1954, where it was noted:

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[92] Cecil Hurst, supra, n. 33, at 159.

[93] 46 International Law Documents, 185, at 186, (1948-1949), (U.S. Naval War College, Newport, R.I.).

[94] C. H. M. Waldock, supra, n. 69, at128-129.

> The Government of Mexico is of the opinion that the waters covering the continental shelf form a single physical and legal entity with, and should be subject to the same rules as, the submerged territory. If, therefore, the submerged territory forms an integral part of the land domain and hence is subject to the sovereignty of the coastal state, then the waters covering the same are likewise subject to its sovereignty.[95]

(2) Argentina

A year after the promulgation of the Mexican Proclamation, Argentina issued a Presidential Decree declaring that the "Argentine Epicontinental Sea and Continental Shelf are subject to the sovereign power of the nation".[96] Like its American and Mexican prototypes the Decree further provides that the waters above the shelf remain unaffected for purposes of free navigation.

The Decree recites that the Public Petroleum Deposits Administration commenced the exploitation of the petroleum deposits discovered along the Argentine continental shelf, thereby "confirming the Argentine nation's right of ownership over all deposits situated in the aforesaid continental shelf." It also declares that it is the Executive's purpose to intensify the exploration and exploitation of the marine resources.

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[95] U.N. Doc. A/2934, Annex, in (1955) I.L.C. Yearbook 19, at 49-50.

[96] Presidential Decree of October 11, 1946, translated in 41 Am. J. Int. L. 11, supp., (1947).

In another recital of the Decree it is claimed that "in the international sphere conditional recognition is accorded to the right of every nation to consider as national territory the entire extent of its epicontinental sea and of the adjacent continental shelf". Lastly the Decree asserts that in conformity with this principle the Government of the United States and of Mexico issued declarations asserting sovereignty over their respective "peripheral epicontinental seas and continental shelves". This assertion is not, of course, true in regard to the United States as to the epicontinental sea.

The area of the continental shelf and superjacent sea claimed by Argentina are nowhere defined in the Decree. It seems that the term "continental shelf" is employed as a geographical rather than as a legal term.

The United States protested this assertion of sovereignty over the epicontinental sea. In a note of the American Ambassador at Buenos Aires, of July 2, 1948, addressed to the Argentine Foreign Office, it was stated:

> ...the principles underlying the Argentine Proclamation differ in large measure from those of the United States Proclamations and appear to be at variance with the generally accepted principles of international law. In these respects the United States Government states in particular that the Argentine Declaration decrees national

> sovereignty over the continental shelf and over the seas adjacent to the coasts of Argentina outside the generally accepted limits of territorial waters.[97]

(3) Chile.

By a Presidential Declaration of June 23, 1947, the the Government of Chile asserted sovereignty

> ...over all the continental shelf adjacent to the continental and island coasts...whatever may be their depth below the sea...(and) over the seas adjacent to the coasts of Chile, whatever may be their depths, and within those limits in order to reserve, protect, preserve and exploit the natural resources...within and below the said seas.[98]

The Declaration further referred to control of fisheries and whaling, announcing that protection zones in the seas under the control of Chile would be created, in virtue of the assertion of sovereignty over the sea, as and when considered convenient and subject to amplification as Chile's future interest might require. As an immediate measure, the Declaration established a protection and control zone of 200 miles from the coast. In a final proviso it is stated that the rights of free navigation on the high seas are not affected.

As a justification of these claims the Declaration invokes the precedent of the actions taken by the United States, Mexico and Argentina, although, as it has been noted above, the two latter states have distorted the United States' views regarding the continental shelf. The Declaration further claims that "international consensus of opinion recognizes the right of every country to consider as its national territory any adjacent extension of the epicontinental sea and the continental shelf".

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[97] 4 Whiteman, Digest of International Law 793.

[98] Ibid., pp. 794-796.

It is worthy of note that the Declaration does not employ the term "continental shelf" in its geographical meaning, since it formulates a claim to the continental shelf and the epicontinental sea regardless of the depth of the water. This can be explained by the fact that the continental shelf, in its strict geographical sense, is narrow along the Chilean coast, as it is along the whole west coast of South America.

The United States protested Chile's claims to the epicontinental sea by means of a note dated July 2, 1948, similar to the one addressed to Argentina, where it was pointed out that the Chilean Proclamation appears to be at variance with the accepted principles of international law. It was further noted that the "Declaration fails, with respect to fishing, to accord appropriate and adequate recognition to the rights and interests of the United States in the high seas off the coasts of Chile".[99]

(4) Peru.

Peru followed the Chilean form of declaration within little more than a month later. A Presidential Decree of August 1, 1947,[100] claimed sovereignty over the continental shelf and the superjacent waters without indicating the extent of the claimed area. Like the Chilean Declaration it does not employ the term "continental shelf" in the geographical sense, obviously for the reason of the narrowness of the Peruvian continental shelf, which, like the Chilean, scarcely extends beyond the three mile limit.

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[99] 51 International Law Situation and Documents 450, (U.S. Naval War College, Newport, R.I., 1956).

Besides announcing assumption of sovereignty over the sea overlying the shelf, "whatever its depth and in the extension necessary to reserve, protect, maintain and utilize natural resources and wealth of any kind,which may be found in or below those waters", the Decree further establishes a control and protection zone of 200 miles, following the Chilean example. Like the previous proclamations, it provides that the right to free navigation of ships of all nations is not affected.

It should be noted that the United States addressed a protest note to the Peruvian Government, dated July 2, 1948, similar to those addressed to Argentina and Chile, where it pointed out that that it reserves its rights and interests so far as concerns any effects of the Peruvian Decree or any measures designed to carry that Decree into execution.[101]

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[100] 4 Whiteman, Digest of International Law, pp. 797-798.

[101] Ibid., at 798-799.

(5) Ecuador.

By a Decree dated February 21, 1951, Ecuador declared:

> All submerged land contiguous to the continental territory of Ecuador where the depth of the superjacent waters does not exceed two hundred meters shall be deemed to constitute the Ecuadorian continental shelf.[102]

Unlike the Chilean and Peruvian Decrees, which do not define the shelf, the Ecuadorian Decree adopts the 200-meter isobath, in spite of the fact that under this definition the breadth of the shelf hardly exceeds three miles from the shore. However, as a result of the extension of the territorial sea to twelve miles, which is further announced in the Decree, the width of the submarine areas under the sovereignty of Ecuador is also extended to twelve miles.[103]

(6) The Joint Declaration of Chile, Ecuador and Peru on the Maritime Zone.

In a joint declaration issued on August 18, 1952,[104] Chile, Ecuador and Peru announced that, in their effort to make available to their respective peoples the natural resources of the areas of the sea adjacent to their coasts, they

> ...proclaim as a principle of their international maritime policy that each of them possesses

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[102] Ibid., at 799.

[103] Ibid., at 800.

[104] Supra, n. 99, at 265.

> sole sovereignty and jurisdiction over the area of sea adjacent to the coast of its own country and extending not less than 200 nautical miles from the said coast.

It is further asserted that "the sole jurisdiction and sovereignty over the zone thus described includes sole sovereignty and jurisdiction over the sea floor and subsoil thereof."

The Declaration does not seem to recognize the right of free navigation in these waters. It only notes in a final proviso that it does not disregard "the necessary restrictions on the exercise of sovereignty and jurisdiction, imposed by international law, to permit the innocent and inoffensive passage of vessels of all nations through the zone aforesaid".

Peru and Ecuador sought to enforce their asserted rights over their 200-mile maritime zones. In two cases vessels fishing in these waters were seized and fines were imposed by the coastal authorities. The first case involved the seizure of five whaling vessels owned by Onassis and flying the Panamanian flag, in November, 1954. All ships were released after the payment of a fine of 3 million dollars.[105] The Peruvian port officer who imposed the fine noted in his judgment that the ships were operating in Peruvian territorial waters, although allegedly they were detected and sighted at a distance of 110 miles from the coast. He further pointed out:

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[105] Supra, n. 99, at 289.

> Hunting and fishing in territorial waters is permitted only to Peruvian nationals and to aliens domiciled in the Republic... Foreign vessels are not permitted to fish in territorial waters. The captains and agents of the arrested ships had acted in full knowledge of the declaration of the maritime zone published by Peru, Chile and Ecuador in 1952...[106]

In the second case Ecuador seized two American fishing vessels off its coasts, seriously wounding an American seaman by gunfire, and despite American protests, it imposed fines of more than 49,000 dollars on the two vessels.[107]

(7) The Practice in other Latin American Countries.

Costa Rica issued a Decree in July 27, 1948,[108] with terms similar to those used in the Chilean and Peruvian Declarations. The Decree purported to claim national sovereignty over the continental shelf and the epicontinental sea on both the Atlantic and the Pacific coasts, out to a limit of 200 miles from the continental Costa Rican shores, regardless of the depth of the water.

Similar action was taken by Panama in 1946,[109] and

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[106] Ibid., at 291-292.

[107] Ibid., at 289.

[108] Supra, n. 93, at 193.

[109] Ibid., at 186.

Nicaragua in 1948.[110] El Salvador[111] and Brazil[112] also issued proclamation on the continental shelf in 1950. Brazil did not claim the epicontinental sea, although it reserved its rights to enact regulations on shipping and in the waters over the shelf.

3. The Latin American Practice and the Conservation and Fishing Zones.

This brief survey of the Latin American practice on the continental shelf indicates that the Latin American countries have gone considerably beyond the limits of the rights asserted by the United States, in that they purport to subject under their sovereignty the waters overlying the shelf. In particular, countries like Chile, Ecuador and Peru have used the notion of the continental shelf as a catch-phrase to justify the expansion of their territorial waters and to secure fishing monopolies on the high seas. However, as it will be submitted below, the coastal state has special interests and preferential rights in regard to the conservation and exploitation of the living resources of the high seas in the vicinity of its coasts, and, it would, therefore, seem that the initiation of conservation measures for these resources and the regulation of their exploitation by the coastal state could be held valid in international law as long as the legal status of these waters as high seas, for purposes other than fishing, is preserved intact.

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[110] Ibid., at 192.

[111] 4 Whiteman, Digest of International Law 801.

[112] U.N. Legislative Series, Laws and Regulations on the Regime of the High Seas, pp. 299-300, (New York, 1951).

The idea for the establishment of conservation zones for the living resources of the high seas adjacent to the coast was suggested by the United States in its Proclamation on Coastal Fisheries,[113] which was issued on the same day as the one on the continental shelf.

In its introduction this Proclamation points out the importance of fishery resources as a source of livelihood for coastal communities and as a food and industrial resource for the nation, and observes that

> ...the development of new methods and techniques contributes to intensified fishing over wide sea areas and in certain cases seriously threatens fisheries with depletion.

With a view to improving "the jurisdictional basis for conservation measures and international co-operation in this field", the Proclamation announces in its operative part the establishment of conservation zones

> ...in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained in a large scale.

The Proclamation further provides that those zones in which activities have been or shall be developed in the future by United States nationals, shall be subject to the control and regulation of the United States. It also recognizes fishing rights to other states and provides for the establishment of conservation zones in concert with other interested states in those areas where fishing activities "have been or shall hereafter be legitimately developed and maintained jointly by nationals of the United States and nationals of other states." In a final proviso it is stated that the conservation zones shall preserve their character as high seas.

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[113] Presidential Proclamation 2668, September 28, 1945: Coastal Fisheries in Certain Areas of the High Seas, 10 Federal Register 12304 (1945); 59 Stat. 885.

It may be noted that the Proclamation purports to control fishing in these areas, unilaterally or in concert with other states concerning not only United States nationals or nationals of other interested states, in the case of joint regulation, but also any other person who might be engaged in fishing activities in these areas. It is obvious that this is not a case of extraterritorial jurisdiction over nationals, but one of jurisdiction on the high seas for specific purposes, which can be enforced _erga omnes_. The proclamation seems to proceed on the theory that the coastal state is entitled to protect and reserve for itself the riches of its adjacent seas. As it will be noted below, the same theory underlies the recent establishment of 200-mile fishing zones.

It is noteworthy that the Geneva Convention on Fishing and Conservation of the Living Resources of the

High Seas of 1958[114] provides that conservation measures on fishing can be adopted by states, unilaterally or jointly, concerning only their nationals. It is further provided that if foreign nationals are subsequently involved in fishing in the conservation zones, the same measures shall be applied to them, "which shall not be discriminatory in form or in fact."[115] In cases of disputes regarding the application of these measures to nationals of other states, the Convention provides for their peaceful settlement by a special commission, in the procedure contemplated in Article 9 of the Convention.[116]

It would appear that this Convention views conservation measures from a wider scope and does not encourage exclusive exploitation or monopoly of the living resources of the high seas. It calls for "international cooperation through the concerted action of all the states concerned"[117] and encourages the initiation of conservation measures with "a view to securing in the first place a supply of food for human consumption."[118] In this respect, it is worth noting that it does not seem that the Convention in its reference to conservation measures for the living resources of the high seas contemplates a preferential fishing status for the coastal state.

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[114] 559 U.N.T.S. 285; 52 Am. J. Int. L. 851, (1958).

[115] Ibid., Articles 1-5.

[116] Ibid., Article 5(2).

[117] Ibid., Introductory recital.

[118] Ibid., Article 2.

It may be noted, however, that in the Resolution on Special Situations Relating to Coastal Fisheries, adopted by the Geneva Conference on the Law of the Sea of 1958,[119] it was recommended that agreements for the establishment of conservation measures for high seas fisheries in the vicinity of the coast, should "recognize any preferential requirements of the coastal state resulting from its dependence upon the fishery concerned, while having regard to the interests of other States." While this Resolution refers to the special interests of the coastal state concerning the living resources of the high seas near its coasts and to a certain degree it recognizes some preferential fishing rights to the coastal state, it does not seem to favour the establishment of conservation zones under the exclusive and unrestricted jurisdiction of the coastal state, an idea which is reflected in the fishing zone concept.

The concept of the fishing zone, as originally proposed by Canada at the Geneva Conference on the Law of the Sea of 1958, was formulated to permit coastal states to establish in the high seas exclusive coastal fishing jurisdiction without qualification in a zone out to 12 miles from their coasts.[120] Canada proposed that the territorial sea should remain at 3 miles, but after the United Kingdom and the United States suggested the extension of the territorial sea up to 6 miles from the coast as a compromise, Canada adopted the same limit and submitted revised proposals on April 16 and 17, 1958, suggesting a fishing zone extending 6 miles beyond a 6-mile territorial sea,[121] (six-plus-six formula). This proposal failed to command a two-thirds majority vote required for adoption.

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[119] U.N. Doc. A/CONF.13/L56, (1958).

Basically the same proposal was submitted to the Second Geneva Conference on the Law of the Sea of 1960, jointly by the United States and Canada. The proposal was so framed as to suspend in favour of historic fishing rights of third states the exclusive jurisdiction of the coastal state during an interim period of ten years.[122] This proposal lacked one vote of the two-thirds majority necessary for passage, and eventually the problem of the extent both of the territorial sea and the fishing zone remained unsettled.

In some instances regional agreements on fishing have been concluded during the period after 1960. For instance the European Fisheries Convention of 1964[123] provided for the establishment of an exclusive six-mile fishing zone measured from the baselines from which the width of the territorial sea is measured, and for an outer six-mile zone measured from the outer limit of the six-mile fishing zone. In this second zone fishing is limited to the coastal state and to other state-parties whose vessels have habitually fished in this zone during the decade commencing in 1953.

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[120] U.N. Doc.A/CONF.13/C.1/L.77/Rev. 1, (1958).

[121] U.N. Doc. A/CONF.13/C.1/L.77/Rev.2 and Rev.3, (1958).

[122] U.N. Doc.A/CONF.19/C.1/L.10, (1960).

[123] 58 Am. J. Int. L. 1070, (1964).

Notwithstanding the fact that a universal agreement on the width of the fishing zone was not reached at the two aforementioned Geneva Conferences on the Law of the Sea, the concept of the fishing zone seems to have evolved to a customary rule.

In the Fisheries Jurisdiction Cases the International Court of Justice noted in this respect:

> Two concepts have crystallized as customary law in recent years...The first is the concept of the fishery zone, the area in which a State may claim exclusive fishery jurisdiction independently of its territorial sea; The extension of that fishery zone up to a 12-mile limit from the baselines appears now to be generally accepted. The second is the concept of preferential rights of fishing in adjacent waters in favour of the coastal state in a situation of special dependence on its coastal fisheries, this preference operating in regard to other states concerned in the exploitation of the same fisheries.[124]

The Court further pointed out that the aforementioned joint proposals of the United States and Canada concerning the width of the fishing zone, as well as the Resolution on Special Situations Relating to Coastal Fisheries were approved by a large majority at the Geneva Conferences on the Law of the Sea of 1958 and 1960, and that the preferential rights of the coastal state were recognized in various bilateral and multilateral treaties. It further noted:

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[124] United Kingdom v. Iceland, (1974) I.C.J. Rep. 3, at 23; Federal Republic of Germany v. Iceland, ibid.,175, at 192.

> State practice on the subject of fisheries reveals an increasing and widespread acceptance of the concept of preferential rights for coastal states, particularly in favour of countries or territories in a situation of special dependence on coastal fisheries.[125]

As to the extent of the fishing zone, although all members of the Court agreed to an exclusive 12-mile zone, disagreement arose over the evolving notion of a greater limit. The Court, by ten votes to four, found that the 50-mile fishing zone established by Iceland in 1972 is not opposable to the United Kingdom, but it did not promulgate a universal rule rendering illegal any extension of the fishing zone beyond the 12-mile limit. So much is this so that by Article 59 of the Statute of the Court "(t)he decision of the Court has no binding force except between the parties and in respect of that particular case."

It may be noted that the Court might have avoided to deal with the question of the legality of the extension of fishing zones beyond the 12-mile limit, because of the impending legislative action of the Third United Nations Conference on the Law of the Sea which was at that time in its second session.

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[125] Ibid., pp. 26 and 195.

It should be further noted that in view of the acquiescence of the generality of states to the recent unilateral establishment of 200-mile fishing zones by a number of states, the legality of such zones would seem undisputed. Among other countries, the United States,[126] Canada,[127] the Soviet Union,[128] Cuba, Japan, the eight maritime countries of the European Economic Community[129] and Mexico[130] proclaimed a 200-mile fishing zone in 1976.

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[126] Fisheries Conservation and Management Act, 90 Stat. 331; P.L. 94 - 265; 16 U.S.C. 1801.

[127] Foreign Vessel Fishing Regulations, P.C. 1976-3178, 23rd December, 1976, S.O.R./77-50, 29 December, 1976, 111 Canada Gazette, part II, No. 1, p. 68.

[128] Edict of the Presidium of the Supreme Soviet of the U.S.S.R. on Provisional Measures for the Preservation of the Living Resources and for the Regulation of Fishing in Marine Areas Adjacent to the Coast of the U.S.S.R., December 10, 1976. 15 International Legal Materials 1381, (1976).

[129] Resolution of the Council of the European Communities on Certain External Aspects of the Creation of a 200-mile Fishing Zone in the Community, with effect from 1 January, 1977. November 3, 1976. 15 International Legal Materials 1425, (1976).

[130] Decree Adding to Article 27 of the Political Constitution, Law on the Exclusive Economic Zone and Decree Amending Law on Fisheries Development. 15 International Legal Materials 380-387, (1976).

These zones are placed under the exclusive control of the coastal state which has the discretionary right to set down terms under which foreign fishing vessels are allowed in the zones, and to impose quotas on the catch of the different species of fish.

4. United Kingdom Practice after 1945.

Even after the promulgation of the United States Proclamation on the continental shelf the United Kingdom maintained the view that the assumption of sovereignty over the continental shelf is a case of occupation of territory. Thus, in the operative part of the Bahamas (Alteration of Boundaries) Order-in-Council of 1948, it is stated:

> The boundaries of the Colony of the Bahamas are hereby extended to include the area of the continental shelf which lies beneath the sea contiguous to the coasts of the Colony, including its dependencies.[131]

Similar Orders were issued for Jamaica,[132] the British Honduras,[133] and the Falkland Islands.[134] It may be noted that there is no indication that these Orders regard the continental shelf as appertaining *ipso jure* to the Colonies and therefore it could not be said that they adopt the continental shelf doctrine.

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[131] (1948) Statutory Instruments, Order-in Council No. 2574, of November 26, 1948, Article 1.

[132] Ibid., Order-in-Council No. 2575, dated November 26, 1948.

[133] Ibid., (1950), Order-in-Council No. 1649, of October 9, 1950.

[134] Ibid., Order-in-Council No. 2100, of December 21, 1950.

5. Saudi Arabia.

In May 1949, Saudi Arabia issued a proclamation on the continental shelf[135] which stated in its operative part that the subsoil and seabed of the areas of the Persian Gulf beyond the territorial sea of Saudi Arabia and contiguous to its coasts appertain to it and are subject to its jurisdiction and control. The Proclamation follows very closely the pattern of the United States Proclamation, probably because of the fact that oil concessions in Saudi Arabia were then held by United States companies.

6. The Persian Gulf Sheikhdoms.

In 1949, the rulers of the Persian Gulf Sheikhdoms,[136] which were at that time British protectorates, issued a series of proclamations on the continental shelf. The first proclamation was issued by Bahrein on June 5, 1949,[137] and is practically identical with those of the other Sheikhdoms. Although the United Kingdom took the initiative to issue these proclamations, they present similarities with the United States Proclamation and they seem to adopt the continental shelf doctrine.

In the operative parts of the Proclamations each

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[135] 43 Am. J. Int. L. 156, (1949), (supp.).

[136] These Sheikhdoms are: Bahrein, Qatar, Abu Dhabi, Kuwait, Dubai, Shayah, Umm al Qeiwain, Ajman, and Ras el Khaima.

[137] Supra, n. 135, at 185.

Sheikh declares the contiguous seabed and subsoil of the high seas bordering on his state's territorial waters to belong to it and to be subject to its jurisdiction and control. It is also provided that the seaward boundaries will be determined on equitable principles in consultation with neighbouring states.

Reference to the continental shelf is not made eo nomine and this can be explained from the fact that within the Persian Gulf there is not a continental shelf in the geological sense, since nowhere the depth of the waters exceeds 200 meters. The geological boundary of the shelf lies at the mouth of the Gulf, where the seabed falls abruptly towards the depths of the Gulf of Oman and the Arabian Sea.

All Proclamations also disclaim any intention to interfere with navigation on the waters overlying the shelf, which preserve their character as high seas.

It is interesting to note that the Sheikhs sought to give effect to their Proclamations regarding only the future, (ex nunc),without vesting them with retroactive force, (ex tunc). In other words,the Proclamations were meant to be constitutive of new rights and not declaratory of pre-existing ones. This was done in an effort to exclude these newly acquired areas from concessions for oil exploitation granted to oil companies in the past. Most of the agreements concluded with oil companies contained a clause stipulating that the concession covers the whole of the signatory ruler's land territory as well as the coastal waters appertaining to such land. Some of the agreements merely stated that the concessions are granted within the area of the Sheikh's rule as marked on the map.

The Sheikhs proceeded to conclude new agreements with other oil companies regarding concessions for oil exploitation on the continental shelf. The oil companies which were parties to the old agreements contended that the continental shelf came under the old agreements and, therefore, the Sheikhs could not consider themselves free to dispose of what they had actually disposed of years ago.

The first dispute arose in 1949 between the Sheikh of Qatar and Petroleum Development (Qatar) Ltd., and was referred to arbitration in April 1950, by virtue of the concession agreement between the parties. In the arbitral award of Lord Radcliffe,[138] who was appointed umpire, it was held that the submarine areas beyond the territorial sea were not included in the old concessions. This view was endorsed by Lord Asquith of Bishopstone in his award in the Abu Dhabi Arbitration,[139] where he found that the oil concessions granted by the Sheikh of Abu Dhabi to

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[138] Petroleum Development (Qatar) Ltd. v. Ruler of Qatar, (1951) International Law Reports, pp. 161-163.

[139] In the Matter of an Arbitration between Petroleum Development (Trucial Coast) Ltd., and the Sheikh of Abu Dhabi. 1 Int. Comp. L. Q. , pp. 247-261. (1952).

Petroleum Development (Trucial Coast) Ltd., a British company, in 1939, included the seabed and subsoil beneath territorial waters, but did not encompass the submarine areas beneath the high seas and adjacent to the coast.

7. Israel.

Israel issued a Governmental Proclamation on the continental shelf, on August 3, 1952,[140] where it was stated:

> The territory of the state of Israel shall include the sea bed and subsoil of the submarine areas contiguous to the coasts of Israel and outside the territorial waters to the extent that the depth of the superjacent waters admits of the exploitation of the natural resources of those areas.

It may be noted that the Proclamation follows the definition of the continental shelf which was adopted by the International Law Commission in its provisional draft articles on the continental shelf, prepared in 1951.[141] The criterion adopted in this definition, which is referred to as the exploitability test, forms one of the two bases of the definition of the continental shelf which was entrenched in the Geneva Convention on the Continental Shelf of 1958.[142]

A Submarine Areas Law,[143] passed in 1953, embodied the Proclamation in domestic legislation.

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[140] 48 Am. J. Int. L. 103, (supp.), (1954).

[141] (1951) I.L.C. Yearbook 141, (vol. II).

[142] 499 U.N.T.S. 311, Article 1(b).

[143] 51 International Law Situation and Documents 475, (U.S. Naval War College, Newport, R.I., 1956).

8. Australia.

The Governor-General of Australia issued two proclamations of similar wording, on September 10, 1953, asserting sovereign rights on the continental shelves of Australia and New Guinea,which is under Australian trusteeship. In their first introductory recitals the Proclamations stated:

> Whereas International Law recognizes that there appertain to a coastal state or territory sovereign rights over the sea bed and subsoil of the continental shelf contiguous to its coasts for the purpose of exploring and exploiting the natural resources of that sea bed and subsoil.[144]

In a final proviso the Proclamations declare that the character as high seas of the waters over the continental shelf remains unaffected.

9. Other State Practice.

Pakistan issued a declaration in 1950, which stated that the seabed along its coasts extending to a water depth of 200 meters shall form part of the territory of Pakistan.[145]

In 1955 India issued a proclamation by which it asserted that it "has and always had full and exclusive sovereign rights" over the seabed and subsoil of the continental shelf for the purpose of exploring and exploiting its natural resources.[146]

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[144] Ibid., at 442

[145] U.N. Legislative Series, Laws and Regulations on the Regime of the High Seas (supp., 1959), p.303.

[146] Ibid., pp. 13-14.

Similar proclamations on the continental shelf were issued by Iran in the same year,[147] and by Portugal in 1956.[148]

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[147] Ibid., (1957), p. 55.

[148] Ibid., (1959), p. 16.

CHAPTER IV

THE NATURAL RESOURCES OF THE CONTINENTAL SHELF

Although the most important resources of the continental shelf which attracted the attention of coastal states were petroleum and other mineral resources, all claims to the continental shelf comprised its living resources as well. The United States Proclamation on the continental shelf in asserting rights over the natural resources of the subsoil and seabed of the continental shelf was not confined only to its mineral resources.[149] Similarly, those proclamations which staked out comprehensive claims over the continental shelf asserted rights both to its mineral and living resources.

While the mineral resources of the continental shelf which appertain to the coastal state can be easily defined, once the area of a state's continental shelf is delimited, its living resources include such a variety of species, that the borderline between them and those species which under the freedom of fishing are available to all states cannot be distinctly drawn.

In a resolution on the juridical regime of the seabed, adopted by the Inter-American Council of Jurists at its third meeting, held in 1956, it was stated:

> The rights of the coastal state with respect to the sea bed and subsoil of its continental

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[149] Supra, n. 7.

> shelf extent also to the natural resources found there, such as petroleum, hydrocarbons, mineral substances, and all marine, animal and vegetable, species that live in a constant physical and biological relationship with the shelf, not excluding the benthonic species.[150]

Since the mineral resources of the continental shelf which appertain to the coastal state do not give rise to any problems as far as the freedom of fishing is concerned, the present examination will comprise only the living resources of the continental shelf and particularly the animal species.

1. The Living Resources of the Continental Shelf.

It would seem that the most appropriate criterion for the determination of the living resources of the continental shelf would be the degree of their association with the seabed.

The most closely associated with the seabed group of living organisms comprises those organisms which are permanently attached to the seabed, such as sponges, corals, chanks and pearl oysters, usually referred to as sedentary fish. As it has been noted above the first state claims regarding submarine areas were made over such resources.[151] Once the larval phase of these organisms' life cycle is over, they remain physically associated with the seabed either by permanent attachment, or immobile incumbency upon it, or by inability to move except in contact with it. Less associated with the seabed are the crustacea, such as lobsters, crabs, shrimbs and prawns. These organisms make limited migrations, while they have a constant physical and biological relationship with the seabed. A third group, not closely related with the seabed are the widely migratory demersal species, which swim in close proximity to the seabed. Such species are the halibut, the cod, the haddock and the hake.[152]

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[150] Brunson McChesney, International Law Situation and Documents, (Situation, Documents and Commentary on Recent Developments in the International Law of the Sea). (Washington, D.C., 1957).

[151] Supra, pp. 11-16.

2. The Discussion of the Problem of the Living Resources of the Continental Shelf by the International Law Commission.

The International Law Commission adopted the term "sedentary fisheries" to describe the living resources of the continental shelf. In the first Report on the High Seas, prepared by the Commission's special rapporteur in 1950, it was stated:

> Fisheries may be described as sedentary either by reason of the species with which they are concerned, that is to say, species attached to the sea bed, or by reason of the equipment employed, for example, stakes driven into the sea bed.[153]

In its first Draft of Articles on the continental shelf the International Law Commission adopted separate provisions for sedentary fisheries. While Article 2 of the Draft purported to vest the coastal state with the right of control and jurisdiction over the continental shelf "for the purpose of exploring it and exploiting its natural resources",[154] sedentary fisheries were excluded from these resources and coastal states were to be vested with the right to exploit the sedentary fisheries off their coasts, in cases where exploitation of these fisheries had been previously maintained and conducted by their nationals, "provided that non-nationals are permitted to participate in the fishing activities on an equal footing with nationals."[155] In its comments to the Article on sedentary fisheries the Commission noted:

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[152] J.A.C. Gutteridge, "The 1958 Convention on the Continental Shelf", 35 Br. Y. Int. L. 102, at pp. 117-119, (1959).

[153] (1950) I.L.C. Yearbook 48, (vol. II).

> The Commission considers that sedentary fisheries should be regulated independently of the problem of the Continental Shelf. The proposals relating to the Continental Shelf are concerned with the exploitation of the mineral resources of the subsoil, whereas, in the case of sedentary fisheries, the proposals refer to fisheries regarded as sedentary because of the species caught or the equipment used...This distinction justifies a division of the two problems.[156]

When the Commission re-examined the problem two years later it reversed its position and included sedentary fisheries in the natural resources of the continental shelf. Thus, in the Commission's second Draft of Articles on the continental shelf, prepared in 1953, the provision on sedentary fisheries was deleted and the topic was included in Article 2 of the new Draft which purported to recognize to the coastal state sovereign rights over its continental shelf in respect of both mineral and living resources. In its commentary to this Draft the Commission noted:

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[154] (1951) I.L.C. Yearbook 141, Draft Articles on the Continental Shelf and Related Subjects, Part I, Article 2.

[155] Ibid., at 143, Part II, Article 3.

[156] Ibid.

> The products of sedentary fisheries, in particular to the extent that they were natural resources permanently attached to the bed of the sea, should not be outside the scope of the regime adopted and that this aim could be achieved by using the term "natural resources". It is clearly understood, however, that the rights in question do not cover so-called bottom fish which, although living in the sea, occasionally have their habitat at the bottom of the sea or are bred there.[157]

This reversal of opinion does not seem to have been the result of criticisms by governments or commentators against the Commision's first stand. In the comments of governments to the 1951 Draft,[158] only Denmark proposed the inclusion of sedentary fisheries in the shelf regime, while Chile suggested placing all fisheries under this regime. The Commission adopted the view of Lauterpacht, who pointed out that he saw no good reason why mineral and non-mineral resources should be treated differently. He opined that the reasons for permitting to coastal states exclusive rights over mineral resources, namely convenience and undesirability of foreign exploitation, applied with equal force to the exploration and exploitation of non-mineral resources as well.[159]

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[157] (1953) I.L.C. Yearbook 214, (vol.II).

[158] Ibid., at 241.

[159] Ibid., at 135, (vol. I).

It may be noted that the above cited excerpt from the Commission's commentary to the second Draft with respect to sedentary fisheries indicates that the term "sedentary fisheries" has been narrowed down in the Commission's thinking only to fisheries of sedentary species, thus excluding those species which are caught by equipment permanently attached to the bottom of the sea.[160] However, in its eighth session, held in 1956, the Commission accepted the special rapporteur's view and decided that it was necessary to adopt provisions regarding these fisheries. Article 60 of the Draft of Articles on the Law of the Sea, prepared during this session, read:

> The regulation of fisheries conducted by means of equipment embedded in the floor of the sea in areas of the high seas adjacent to the territorial sea of a State, may be undertaken by that State where such fisheries have long been maintained and conducted by its nationals, provided that non-nationals are permitted to participate in such activities on an equal footing with nationals.[161]

This Article was finally included in the Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas.[162]

At the Commission's eighth session it was also proposed that the term "sedentary fisheries" should comprise only those species which are permanently attached to the seabed. Others were in support of a wider definition including also species which, although not permanently attached to the seabed, live in constant physical and biological relationship with it.[163] The Commission, unable to reach an agreement, decided to leave the text and the comments of the 1953 Draft as it stood, thus retaining the term "natural resources" which includes mineral resources and sedentary species of fish.

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[160] Supra, n. 157.

[161] (1956) I.L.C. Yearbook 253, at 263, (vol. II).

[162] 559 U.N.T.S. 285, Article 13.

3. The Problem of Sedentary Fisheries in Theory.

Before referring to the discussions on sedentary fisheries at the Geneva Conference on the Law of the Sea of 1958 and the regime adopted by the Geneva Convention on the Continental Shelf it may be expedient to examine some theoretical views concerning these fisheries.

Long before the emergence of the continental shelf doctrine in international law there was a current of opinion that sedentary fisheries were an exception to the rule that fishing on the high seas was open to all states. Gidel noted in this respect:

> C'est poursuivre la quadrature du cercle que de prétendre concilier la légitimité de pêcheries sédentaires en dehors de la limite des eaux territoriales avec la notion de liberté de la haute mer. Liberté de la haute mer et pêcheries sédentaires ne sont pas combatibles en tant que notions de même valeur et de même range.[164]

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[163] Supra, n. 161, at pp. 297-298, commentary to Article 68, par. 4.

[164] Gilbert Gidel, supra, n. 9, at 500.

Oppenheim - Lauterpacht held the view that rights to sedentary fisherries can be acquired by the coastal state through effective occupation:

> It would not be inconsistent with principle, and would be more in accord with practice, to recognize frankly that, as a matter of law, a State may by strictly local occupation acquire, for sedentary fisheries and other purposes, sovereignty and property in the surface of the sea-bed, provided that in so doing it in no way interferes with freedom of navigation and perhaps we should add, with the breeding of free swimming fish.[165]

It may be noted that the problem of sedentary fisheries was inevitably linked with the question whether the legal regime of the seabed underlying the high seas should be assimilated with that of the high seas, which is considered as res omnium communis,an idea which echoes the views of Grotius, who propounded the principle of the freedom of the high seas in his work Mare Liberum,[166] or it should be considered as a res nullius, susceptible of acquisition through effective occupation.

According to a commentator, the reasons for maintaining the high seas unappropriated in the interests of the freedom of navigation apply with equal force to the seabed.[167] In this view the seabed being equally free to all states, exclusive rights can be acquired, if at all, through a prescriptive use over a long period of time and the express acquiescence of other states.

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[165] 1 Oppenheim - Lauterpacht, International Law, p. 628, (eighth ed.,1955).

[166] Mare Liberum was written in 1604 and published in 1609. It forms the twelfth chapter of Grotius's work De Jure Praedae which was published only in 1868.

Other writers considered the seabed under the high seas not as part of the sea, but as territory covered by the sea and, therefore, as res nullius, on which sovereign rights can be obtained through effective occupation, without the acquiescence of other states, subject only to no unreasonable interference in the free use of the high seas overlying the seabed.[168]

Hence national claims over sedentary fisheries were inevitably connected with the conflicting opinions in theory regarding the validity of such claims in international law. The emergence of the continental shelf doctrine in the years after 1945 offered a definive solution to these conflicts like a deus ex machina. For it delivered the proponents of national claims to sedentary fisheries from an increasing legal controversy and uncertainty. No longer was it necessary to rely on equivocal factual arguments, or on debatable applications of the principles of prescrption, usage, occupation and acquiescence of third states. Under the new shelf doctrine it is sufficient to establish a connenction between the sedentary species and the seabed and then to contend that this relationship made these species natural resources of the seabed. However, the problem regarding the species which come under the term "sedentary fish" was still an issue at the Geneva Conference on the Law of the Sea of 1958.

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[167] C. J. Colombos, The International Law of the Sea, pp. 62-63, (fifth ed., 1962).

[168] 1 P. Fauchille, Traité de Droit International Public, p. 19, (1925). 1 J. Westlake, International Law, pp. 187-188, (1904).

4. The Problem of Sedentary Fisheries at the Geneva Conference on the Law of the Sea of 1958. The Convention on the Continental Shelf.

To form a legal definition of the living resources of the continental shelf acceptable by all states was a difficult task in the Geneva Conference of 1958. Besides the controversial biological facts regarding these resources, the Conference had to strike a balance between the interests of distant-water fishing states and those which are engaged in fishing mainly off their coasts. Countries with large fishing fleets favour a liberal fishing status on the epicontinental sea and consequently restricted rights of the coastal state over the living resources of the continental shelf, while those countries which lack high fishing capability seek to secure extensive rights over the living resources of the submarine areas in the immediate vicinity of their coasts.

Some states suggested that the rights of the coastal state be limited only to mineral resources, while other states wanted to extend them to include "bottom fish", a group of species which, although widely migratory, swim in close proximity to the seabed.[169]

Between these two extreme views a compromising proposal was tabled jointly by Australia, Ceylon, the Federation of Malaya, India, Norway and the United Kingdom, which was accepted in committee IV of the Conference. The proposal read:

> The natural resources referred to in these articles consist of mineral and other non-living resources of the sea-bed and the subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move, except in constant physical contact with the sea-bed or the subsoil; but crustacea and swimming species are not included.[170]

Commenting on this proposal Professor Baily of Australia pointed out that apart from the mineral resources which comprise most of the non-living resources of the seabed and the subsoil, the phrase "and other non-living resources" has been added to include resources such as shells of dead organisms. He further noted that the permanent association of some living resources with the mineral resources of the seabed and subsoil made it inadvisable to provide that they might be exploited by any other state and he submitted that both these kinds of resources should be exploited jointly and the coastal state should be vested with exclusive rights in respect of both kinds of these resources.

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[169] U.N. Doc.A/CONF.13/C4/L36, p. 69. The Greek proposal to restrict the coastal state's rights to mineral resources and the Burmese proposal to include bottom fish in the term "natural resources" were defeated by overwhelming majorities.

[170] U.N. Doc.A/CONF.13/C4/SR.24, p. 7.

In an apparently exhaustive enumeration of the living organisms of the seabed belonging to sedentary species, Professor Baily included corals, sponges, oysters, including pearl-oysters, pearl-shells, the sacred chank of India and Ceylon, the trochus and plants. Referring to the last proviso of the proposal, he noted that swimming species were excluded from the definition, as not sedentary. Although the term "crustacea" included all crabs, of which some species are able to move only in contact with the seabed, he opined that they should be also excluded from the definition, since these species could move considerable distances.[171]

In the plenary meetings of the Conference it was decided to delete the final proviso of this proposal and the wording of the final form was approved by an overwhelming majority.[172] The proposal was eventually incorporated in the Geneva Convention on the Continental Shelf, as Article 2(4).[173]

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[171] U.N.Doc.A/CONF.13/C4/SR.21, pp. 7-8. See also M. Whiteman, "Conference on the Law of the Sea: Convention on the Continental Shelf", 52 Am. J. Int. L.,pp. 638-640, (1958).

Some data illustrating the complex relationships of these organisms with each other, the sea and the seabed can be found in one of the preparatory documents of the Conference, prepared by the Secretariat of the Food and Agriculture Organization (FAO); See Preparatory Doc. No. 10, "Examination of Living Resources Associated with the Sea Bed of the Continental Shelf, U.N. Doc.A/CONF.13/13, (Nov. 6, 1957).

[172] Geneva Conference on the Law of the Sea, 2 Official Records, pp. 13-15, (Doc.A/CONF.13/38, (1958)).

It may be noted that this definition in employing the term sedentary as meaning "immobile on or under the seabed" or at least "unable to move except in constant physical contact with the seabed or subsoil" covers satisfactorily all species, attached or unattached to the seabed, which are not self-propelled, as well as creeping or burrowing organisms. Furthermore, the phrase "at the harvestable stage", referring to the harvestable stage of the organism's life cycle, provides a useful criterion for determining at what point of time the sedentary character of a species is to be ascertained. Consequently, creatures which are free swimming at the harvestable stage, although they spend much time of their life cycle on the seabed, like halibut, do not come under the definition.

The inclusion of sedentary fish in the resources of the continental shelf was criticized by several scholars both on scientific and practical grounds. According to one view the position of the Geneva Convention regarding the living resources of the continental shelf lacks clarity of distinction in drawing the dividing line between high seas fisheries and those living organisms which appertain to the coastal state as resources of the continental shelf, and adopts an artificial division of the living resources of the high seas.[174] Another commentator points out that the biological interrelation and interdependence of the living resources of the sea is such, that the regulation of some species under one regime, i.e. the Convention on the Continental Shelf, and of others under another, i.e. the Convention on Fishing and Conservation of the Living Resources of the High Seas[175] may cause problems with respect to the effective management and regulation of the living resources of the high seas. He further notes that the unilateral regulation of any fishery in the high seas creates a serious hazard to the freedom of the high seas fisheries[176] and interferes with international navigation.[177]

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[173] 499 U.N.T.S. 311.

As far as the alleged interference with navigation is concerned, it may be noted that if such interference could ever occur, it could be caused by any fishing operations on the high seas, regardless of whether they are carried out by the coastal or any other state. In this respect it is worth noting that the exploitation of the living resources of the continental shelf is not carried out through permanent installations attached to the seabed and does not prejudice the character of the superjacent waters as high seas.

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[174] D. W. Bowett, The Law of the Sea, p. 36, (Manchester University Press, 1967).

[175] This Convention was also adopted by the Geneva Conference on the Law of the Sea of 1958, (559 U.N.T.S. 285). See also supra, pp. 57-59.

[176] Richard Young, "The Geneva Convention on the Continental Shelf: A First Impression", 52 Am. J. Int. L. 733, at 736, (1958).

[177] Richard Young, "Sedentary Fisheries and the Convention on the Continental Shelf", 55 Am. J. Int. L. 359, at 372, (1961).

In respect to the alleged hazard to high seas fisheries it should be noted in the first place that the rules of the Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas relating to fishing carried out by means of equipment permanently attached to to the seabed take into consideration the rights of non-nationals, in providing that such fishing may be undertaken by the coastal state in areas where its nationals have long been engaged in,provided that non-nationals are also "permitted to participate in such activities on an equal footing with nationals, except in areas where such fisheries have by long usage been exclusively enjoyed by such nationals".[178] It would also appear that the Convention does not prevent foreign nationals from fishing the same stock by different methods, even in the same area.

Furthermore, the definition of Article 2(4) of the Geneva Convention on the Continental Shelf, concerning the species which are regarded as resources of the continental shelf, encompasses those living resources which have been the object of traditional claims in the past, on the basis of long usage, actual exploitation and prescription. On the other hand, since the main bulk of fish species, namely free swimming fish, remain outside the scope of the shelf regime, it can be said that the freedom of high seas fisheries still remains the rule.

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[178] 559 U.N.T.S. 285, Article 13(1).

The Convention on the Continental Shelf confers jurisdiction on coastal states in regard to those living resources, whose exploitation interferes with the exploitation of the non-living resources and vice versa.[179] The contention that the distinction of free swimming fish and sedentary fish is "highly artificial" and "one more way of giving the coastal state exclusive claims to fishery resources"[180] overlooks the fact that the task of the Geneva Conference in this respect was the reconciliation of conflicting interests through a compromising solution and not the division of the living resources of the sea according to the science of ichthyology.

Furthermore, the Convention, in vesting the coastal states with rights over sedentary fisheries, has only responded, to a limited extent, to the widely accepted need to conserve and manage the living resources of the sea in the vicinity of the coast. Recent years have also seen a number of attempts to bring all marine organisms on the shelf or in the waters above under the control of the coastal state by means of the shelf doctrine.[181] A more decisive movement towards this direction was the establishment by certain states of a 200-mile fishing zone[182] and the proposal to establish a 200-mile economic zone, by which all resources in this zone, either living or non-living, in or under the ocean, would be placed under the jurisdiction of the coastal state.[183]

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[179] The United Nations and Ocean Management, (Proceedings of the Fifth Annual Conference of the Law of the Sea Institute, held in June 1970), pp. 96-98, (Kingston, R.I., 1970).

[180] Bowett, supra n. 174, at 35.

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[181] This trend is reflected in the Latin American practice on the continental shelf. See supra, pp. 46 ff.

[182] Supra, pp. 63-64.

[183] The view that coastal states have the right to determine the limits of their sovereingty over both the seabed and the water column was propounded by the Latin American countries, which had already claimed sovereingty over the shelf and the epicontinental sea in their earlier proclamations on the continental shelf, in the Declaration of Montevideo, of May 8, 1970, and the Declaration of Lima, of August 8, 1970. The two Declarations, which are of similar content, point out that this right emanates from the geographical, economic and social links between the sea, the land and its inhabitants and from the need of the coastal state to protect itself from over-exploitation and pollution in its adjacent waters. (The Texts of the Declarations are reprinted in S. Oda, The International Law of the Ocean Development, pp. 347-355, (1972)).
The economic zone concept was introduced by the representative of Kenya at the annual meeting of the Asian-African Legal Consultive Committee, held at Lagos, Nigeria, in January, 1972,(2 Brief of Documents on the Law of the Sea, p. 161, (14th Session)). This concept was widely supported by the coastal developing nations of Africa and Asia, obviously because substantial economic interests could be expected only from the resources in their adjacent waters, since these countries do not have the means to engage in long-distance fishing. This concept was subsequently confirmed at the

(continued on next page.)

5. The Legal Status of the Living Resources of the Continental Shelf within the 200-mile Fishing Zone. Possible Effects of the Acceptance of the 200-mile Economic Zone Proposal.

The practical importance of the distinction between free swimming and sedentary fisheries within the shelf area is minimized in cases where 200-mile fishing zones have been established. The same effect would have the institutionalization of a 200-mile economic zone.

The problem of the distinction would not arise with respect to the living resources within the 200-mile fishing zone, since the coastal state is vested with discretionary power over all kinds of fishing activities in this zone. In cases where such zones have been established by unilateral action, the coastal state has assumed control and jurisdiction over foreign fishing vessels, with the power to impose restrictions regarding the maximum allowable catch as well as conservation limits on various species.

Similar effects would have the establishment of a 200-mile economic zone. According to the Draft Articles on the economic zone, prepared by the Third United Nations Conference on the Law of the Sea, the coastal state would enjoy in this zone:

(continued from page 88.)
African States Regional Seminar on the Law of the Sea, held at Yaounde, Cameroon, in June 1972,(A/AC.138/79). The meeting of Ministers of the Caribbean Countries, held in June, 1972, at Santo Domingo, adopted similar principles by declaring a 200-mile "patrimonial sea", (A/AC.138/80).

> ...sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the sea-bed and subsoil and the superjacent waters...[184]

It is worth noting that the 200-mile limit has also been employed in the draft definition of the continental shelf, prepared by the same Conference. This definition reads:

> The continental shelf of a coastal state comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.[185]

It follows from this definition that the distinction between sedentary and free swimming fish is still of value in cases where the continental shelf extents beyond the 200-mile limit.

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[184] Third United Nations Conference on the Law of the Sea, VIII Official Records, Informal Composite Negotiating Text, p. 13, Article 56(1)(a), (U.N.Doc. A/CONF.62/WP.10), (Sixth Session, New York, 23 May - 15 July, 1977).

[185] Ibid., at 16, Article 76.

CHAPTER V

THE LAW OF THE CONTINENTAL SHELF

1. Customary International Law.

The question whether a body of customary international law governing the continental shelf has emerged from the practice of states is of primary significance. In view of the extensive state practice and the global character of the problem, it is apparent that any customary international law on the subject would be general and therefore binding upon states even if they are not parties to the Geneva Convention on the Continental Shelf of 1958. This is particularly important, in view of the limited number of states which have todate ratified this Convention.[186]

The examination of this question will also reveal the background of the Geneva Convention and the circumstances which dictated its adoption (casus legis) and will clarify the intended meaning and the underlying rationale of its provisions (ratio legis). Furthermore, it will focus on the role of unilateral state action in the process of the generation of customary rules of the international law of the sea, which is

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[186] As of December 31, 1977, only 53 states had ratified the Geneva Convention on the Continental Shelf. (Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions. List of Signatures, Ratifications, Accessions, etc., as at 31 December 1977, U.N.Doc.ST./LEG./Ser.D/11, pp. 538-539).

> ...a process of continuous interaction, of continuous demand and response, in which the decision-makers of particular nation states unilaterally put forward claims of the most diverse and conflicting character to the use of the world's seas, and in which other decision makers, external to the demanding state and including both national and international officials, weigh and appraise these competing claims in terms of interests of the world community and of the rival claimants, and ultimately accept or reject them...[187]

Since the cornerstone of the whole continental shelf theory is the continental shelf doctrine, by which the coastal state exercises ipso jure sovereign rights over its continental shelf for the purpose of its exploration and exploitation of its natural resources, the basic question to be answered in this respect is whether this doctrine has acquired the status of a customary rule of international law. The doctrine has been entrenched in the Geneva Convention on the Continental Shelf, which came into force on June 10, 1964. Article 2(1-3) of this Convention reads:

> 1. The coastal state exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
> 2. The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal state does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal state.

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[187] M. S. McDougal, "The Hydrogen Bomb Tests and the International Law of the Sea", 49 Am. J. Int. L. 356, at 357. (1955).

> 3. The rights of the coastal state over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.[188]

A rule of customary international law would seem to emerge from a uniform and consistent practice by a number of states with reference to a situation falling within the purview of international relations, provided that such practice is prolonged over a period of time (longa consuetudo) and is followed by states in the belief that is required by, or is consistent with international law, (opinio juris vel necessitatis).[189]

As it has been noted above, any custom emerging from the practice of states in regard to the continental shelf would be general, in the sense that it would be of universal applicability as a manifestation of the collective will of a great number of states. A general custom, once it is established, is binding even upon states which have not actively contributed to its creation or acquiesced to it, unless they oppose to it expressis verbis. Consequently, the proof of the existence of a general custom is sufficient to support the presumption that it is binding upon all states. Any state claiming that is not bound by such custom would, therefore, have to produce evidence of its opposition to it.

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[188] 499 U.N.T.S. 311.

[189] In his dissenting opinion in the Anglo-Norwegian Fisheries Case, Judge Read referred to customary international law as the "generalization of the practice of states". (1951) I.C.J. Rep. 116, at 191.

Article 38 of the Statute of the International Court of Justice refers to "international custom,as evidence of a general practice accepted as law."

In contradistinction to the general custom stands the special custom, which develops from the practice of a relatively small number of states, has restricted application in space, and refers to special areas of international relations. In the case of a special custom, a state claiming that such custom has a binding force upon another state has the burden of the proof of its contentions. In the Asylum case, where the Colombian Government tried to rely upon an alleged regional or local custom peculiar to Latin America, regarding the diplomatic asylum, the International Court of Justice, in rejecting the contentions of the Colombian Government, referred to the elements of the special international custom, which, with the exception of the burden of proof, are the same with the elements of the general custom:

> The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State.[190]

It may be noted that the Court in this case does not refer to the element of time. On the other hand, the fact that in the Paquete Habana, the Lola, reference is made to the exemption of coast fishing vessels from capture as prize of war "(b)y an ancient usage among civilized nations, beginning centuries ago and gradually ripening into a rule of international law"[191], does not necessarily mean that the passage of a long period of time is a sine qua non condition for the formulation of a customary rule of international law.

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[190] (1950) I.C.J. Rep. 266, at 276.

As regards the requirement of uniformity and consistency of state practice, it may be noted that the above examination of state practice on the continental shelf[192] has not brought into relief any basic differences among the various proclamations asserting rights to submarine areas. The fact that the claims advanced by the Latin American counties were of far greater scope than those of other countries, in that they purported to encompass both the continental shelf and the superjacent waters, neither contradicts nor interrupts the series of uniform state practice on the subject.

With respect to the fact that the notion "continental shelf" was attributed various meanings in state proclamations and different terms were employed to describe the submarine areas on which claims were asserted in the various proclamations, it should be noted that it does not contradict the contention that state practice on the subject is uniform and consistent.

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[191] 175 U.S. 677, at 686, (1900).

[192] Supra, Chapter III.

In some of the proclamations the term "continental shelf" is not used and reference is made instead to the subsoil and seabed beyond the territorial sea and contiguous to the coasts.[193] In others this term denotes the area included within the 200-meter depth contour line beyond the limits of the territorial sea,[194] or the seabed within the 200-mile limit.[195] Chile and Peru referred to "the continental shelf" adjacent to the coast, regardless of water depth.[196] The United Kingdom in the Gulf of Paria (Annexation) Order[197] and the Falkland Islands Order-in-Council[198] define the outer limit of the continental shelf in some detail by geographic co-ordinates.

These differences among the various proclamations are due to the dissimilar geological structures of the seabed in different parts of the world. The terms employed in each proclamation were couched to suit the configuration of the submarine areas in the respective country.

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[193] Proclamations of Saudi Arabia and the Persian Gulf Sheikhdoms, supra pp. 65, 66.

[194] See, e.g., Proclamation of Ecuador, supra, p.52.

[195] Proclamation of Costa Rica, supra, p. 54.

[196] Supra, pp.49, 51.

[197] Supra, n. 56.

[198] Supra, n. 134.

As regards the nature of the rights asserted over the continental shelf, it may be noted that despite some variations in the terms employed in the various proclamations, it is possible to identify certain common factors evidencing a consistency of state practice on the subject. The actual common denominator of state claims is in fact the assertion of sovereign rights over the adjacent submarine areas for the purpose of exploring and exploiting its resources.

Another important requirement for the formulation of a customary rule of international law is the element of opinio juris vel necessitatis, i.e. the consciousness that a specific international practice is pursued with a conviction that it is in conformity or is demanded by law. This element distinguishes the custom generating state practice from state usage which is followed as a matter of convenience or courtesy.

In the Lotus case the Permanent Court of International Justice demanded a positive proof that the abstention of states from a specific conduct was due to their conviction that they were legally obliged to abstain. In the absence of such proof the Court found it impossible to accept the contention that the abstention of states from a certain behaviour generated a customary rule and noted that "only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom".[199]

The International Court of Justice in its decision in the North Sea Continental Shelf Cases took a similar view in rejecting the contention of Denmark and the Netherlands that the equidistance rule for the delimitation of the continental shelf, which is embodied in Article 6 of the Geneva Convention on the Continental Shelf, has acquired the status of a customary rule. The Court noted:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a substantive element, is implicit in the very notion of the opinio juris sive necessitatis. The States must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not in itself enough.[200]

It may be noted that the requirement of proof of the element of the opinio juris renders the confirmation of the existence of a customary rule extremely difficult, since such proof would have to be based on instances of specific and articulate conduct of states, expressing their conviction that they act in compliance with a rule of law. In view of this difficulty it has been suggested by Hersh Lauterpacht that a continuously uniform conduct of states within legally relevant spheres of action should be considered as a sufficient proof of the existence of the opinio juris. This view is founded on the rebuttable presumption that the uniformity and consistency of a certain state practice is conceived by the generality of states as due to a consciousness of conformity with law. Hersh Lauterpacht noted in this respect:

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[199] P.C.I.J. Series A, No. 10, (1927), p. 28.

[200] (1969) I.C.J. Rep. 3, at 44.

> Unless judicial activity is to result in reducing the legal significance of the most potent source of rules of international law, namely, the conduct of states, it would appear that the accurate principle on the subject consists in regarding all uniform conduct of Governments (or in appropriate cases abstention therefrom) as evidencing the opinio necessitatis juris except when it is shown that the conduct in question was not accompanied by any such intention.[201]

A similar view was expressed by the same writer in an Article, published eight years earlier, where he referred to the state practice on the continental shelf. He noted:

> Unilateral declarations by traditionally law-abiding states, within a province which is particularly their own, when partaking of a pronounced degree of uniformity and frequency and when not followed by protests of other states, may properly be regarded as providing such proof of conformity with law as is both creative of custom and constitutive evidence of it.[202]

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[201] Hersh Lauterpacht, The Development of International Law by the International Court, p. 380, (London, 1958).

[202] Hersh Lauterpacht, "Sovereignty over Submarine Areas", 27 Br. Y. Int. L. 376, at 395, (1950).

The latter view introduces the decisive element of the general acquiescence of states which is presumed to exist in the absence of protests from states affected by a new state practice. This element serves as an objective criterion for the determination of the existence of the _opinio juris_, which, as it has been noted, if viewed only as a subjective element indicating the motives of states which initiate a new practice, would render the determination of the existence of a customary rule too difficult or too arbitrary. The general acquiescence of states attests to the legality of a newly advanced practice and presumes the existence of the consciousness of states that their conduct is in conformity with law. For "the absence of protests, in the face of an apparently new departure publicly proclaimed provides evidence of the essential conformity of the new practice with the principles of international law."[203]

The same view was upheld by the International Court of Justice in the _Fisheries_ case, where it noted that the method of straight lines employed by Norway in drawing the baseline for the delimitation of the outer limit of its territorial sea

> ...has been consolidated by a constant and sufficiently long practice, in the face of which the attitude of governments bears witness to the fact that they did not

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[203] Ibid.

consider it to be contrary to international law."[204]

It may be noted that this presumption applies in cases where state practice consists in the assertion of rights, as it actually happens with the practice on the continental shelf. In such cases the element of *opinio juris* indicates that the practice is understood by the states initiating it as consistent with, but not necessarily as required by law. For the consciousness that a certain conduct is demanded by law would imply that it is performed in the belief that it forms a duty or a legal obligation.[205] This, however, would not be in consonance with the principle that the assertion or the exercise of rights is not obligatory in law (*beneficia non obtruduntur*).

The preceding observations indicate that the acquiescence of the generality of states to the state practice on the continental shelf, which is evidenced by the absence of protests, witnesses the conformity of this practice with law and presumes the concurrence of the element of the *opinio juris*.

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[204] *Fisheries* case (*United Kingdom* v. *Norway*), (1951) I.C.J. Rep. 116, at 139.

[205] It is in this meaning that the notion *opinio juris* is employed in the above cited excerpts from the decisions of the International Court in the *Lotus* and the *North Sea Continental Shelf Cases*. This is actually one of its two aspects, namely, that the conduct of states in question should be accompanied by the belief that it is obligatory. The other aspect, which applies in cases where rights are asserted, signifies the consciousness of the states involved (continued on next page.)

It should be noted, however, that the acceptance by the community of states of a state practice which involves the assertion of rights based on the contention that they do not violate any rule of international law, would alone suffice to render such conduct lawful.[206] It would be excessively formalistic to seek in this case evidence of the existence of the subjective element of the opinio juris, which would not, of course, suffice to render such claims lawful if they encroach upon the rights of the international community and they are met with protest and resistance by the community of states.

(continued from page 101.)
that their practice is permissible in law.

Article 38 (1) (b) of the Statute of the International Court of Justice refers to "international custom, as evidence of a general practice accepted as law;" The phrase"accepted as law" seems to indicate both aspects of the opinio juris.

[206] In such cases a certain conduct is considered lawful not because of the existence of a rule of law allowing it, but because it does not violate any principle of international law. In the Lotus case the Permanent Court of International Justice was asked, by a special agreement between France and Turkey, to pronounce upon the question whether Turkey acted in conflict with the principles of international law by instituting criminal proceedings against the French officer of the watch on board the French ship "Lotus" following its collision with a Turkish ship on the high seas. The Court noted that "(a)ccording to the special agreement...it is not a question of stating principles which would permit Turkey to take criminal proceedings, but of formulating the principles, if any, which might have been violated by such proceedings." (P.C.I.J. Ser. A, No. 10, (1927), at p. 18).

As regards the element of time as a necessary prerequisite for the development of a customary rule of international law, it may be noted that it is impossible to fix any specific length of time needed for the emergence of a customary rule. Some lapse of time would, of course, be indispensable in order to make discernible and legally legible the general trends of a certain practice, but this does not mean that state practice need last for a long period of time.

According to a theoretical view, a customary rule "may arise simply from the fact that states in their mutual relations observe a certain definite attitude for a long period of time".[207] Another commentator considers as an important factor for the growth of custom "the slow consolidation by the action of time."[208] It should be born in mind, however, that even in the case of acquisition of prescriptive rights,[209] where the role of time is particularly important,[210] the length of time is indeterminate. Oppenheim holds the view that no general rule can be laid down as to the length of time required for prescription.[211] Of the same view is Scelle, noting:

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[207] L. Kopelmanas, "Custom as a Means of the Creation of International Law", 18 Br. Y. Int. L., 127, at 132, (1937).

[208] Charles de Vischer, "Reflections of the Present Prospects of International Adjudication", 50 Am. J. Int. L. 472, (1956).

[209] Lauterpacht noted that "customary international law is not yet another expression for prescription". (Supra, n. 202, at 393).

> ...le Droit International ne comporte pas de délais déterminés des prescriptions, et il est un peu naif de la part de certains auteurs d'avoir essayé de les chiffrer (quarante ou cinquante ans).[212]

As it has been noted above, in the Paquete Habana, the Lola it was found that the custom in question had begun "centuries ago".[213] It was also stated by the International Court of Justice in the Right of Passage over Indian Territory case that the practice established between Portugal and India "continued over a period extending beyond a century and a quarter"[214] and in the Fisheries case the same Court emphasised the length of time elapsed since the inception of the Norwegian system of baseline determination in the 19th century.[215]

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[210] Hall refers to the acquisition of territory by prescription "through the operation of time". (W. E. Hall, A Treatise on International Law, p. 125, eighth ed., 1920).

[211] L. Oppenheim, International Law: A Treatise, pp. 402-403, (third ed., 1920).

[212] George Scelle, Manuel de Droit International Public, p. 160, (Paris, 1948).

[213] Supra, n. 191.

[214] (1960) I.C.J. Rep. 6, at 40.

[215] (1951) I.C.J. Rep. 116, at 134-139.

There is no indication, however, that in these cases the length of time was considered as a necessary prerequisite for the development of the respective customs. In this connection it is worth noting that in the Scotia case the Supreme Court of the United States established that the length of time is not an element in the formulation of a rule of customary international law, but that the acceptance of a certain state practice by the major interested states is sufficient.[216] A similar view was expressed by the International Court of Justice in its decision in the North Sea Continental Shelf Cases where it held that "the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law."[217] What was rather considered by the International Court as indispensable for the emergence of a customary rule was

> ...that within the period in question...State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform...and should moreover have occured in such a way as to show a general recognition that a rule of law or a legal obligation is involved.[218]

Brierly points out that the development of a new custom is a slow process and that the formation of new law in modern international relations is closely linked with the law-making treaty. He admits, however, that customary rules can still emerge "when the need is sufficiently clear and urgent" and he cites the example of the rapid development of the principle of sovereignty over the air.[219]

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[216] 81 U.S. (14 Wall.) 170, at 187-188, (1871).

[217] (1969) I.C.J. Rep. 3, at 42.

[218] Ibid.

Referring to state practice on the continental shelf Hersh Lauterpacht noted, as early as 1950, that a consistent and uniform usage "can be packed within a short space of years".[220] He also pointed out:

> The 'evidence of a general practice accepted as law' - in the words of Article 38 of the Statute - need not be spread over decades. Any tendency to exact a prolonged period for the crystallization of custom must be proportionate to the degree and the intensity of the change that it purports or is asserted to effect...
> ...assuming that we are confronted here with the creation of a new international law by custom, what matters is not so much the number of states participating in its creation and the length of the period within which that change takes place, as the relative importance, in any particular sphere, of states inaugurating the change.[221]

He further noted that the initiation of the practice on the continental shelf "did no violence to any established prohibition - or proposition - of international law."[222]

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[219] J. L. Brierly, The Law of Nations, p. 62, (Sixth ed., 1963).

[220] Lauterpacht, suprà, n. 202, at 393.

[221] Ibid., at 393, 394.

[222] Ibid., at 394.

Speaking at a meeting of the International Law Commission in 1953, J. M. Jepes, a delegate from Colombia, noted that in the formation of the customary rule by which the coastal state is entitled to exercise sovereign rights over its continental shelf for the exploitation of its resources no account had been taken of the length of time, which some publicists consider as a sine qua non condition for the development of custom, because the practice on the continental shelf was an exceptional case, since it was dictated by an urgent need for new energy and food resources, and the duration was not absolutely essential, provided that the principle of opinio juris had been observed.[223]

It may be noted that the time element, although important in cases where a pre-existing rule of law is being derogated by a new practice which proceeds contra legem, is irrelevant in the case of state practice on the continental shelf, because this practice proceeded secundum legem. As MacGibbon put it, a customary rule can grow from a uniform practice which is exercised as rightful and is accepted as lawful.[224]

It is submitted that the practice on the continental shelf was accepted as law by the community of states, since it was followed as of right and it did not give rise to protests. It would, therefore, appear that the continental shelf doctrine crystallized into a customary rule of international law before the adoption of the Geneva Convention on the Continental Shelf of 1958.

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[223] (1953) I.L.C. Yearbook 122, (vol. I).

[224] I. C. MacGibbon, "Customary International Law and Acquiescence", 33 Br. Y. Int. L. 115, at 131, (1957).

Opposition to the view that a customary rule developed from the state practice on the continental shelf was voiced by several publicists. Mouton noted in 1954 that "it is at this moment premature to say that a generally recognized rule of customary law exists",[225] although he had noted two years earlier that "the value of the unilateral acts (concerning the continental shelf) is an initiative impulse to a new development in international law".[226]

Kunz, writing in 1956, although he characterized the doctrine and practice on the continental shelf as a situation of confusion and abuse, he nevertheless thought that in view of the practice of states and the lack of protests the continental shelf doctrine could be considered as a new norm of customary international law "*in fieri, in statu nascendi*" and that there was a clear tendency towards the coming into existence of this new norm.[227]

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[225] M. Mouton, "The Continental Shelf", Academie de Droit International, 85 Recueil de Cours 436, (Leyden, 1954).

[226] M. Mouton, *The Continental Shelf*, p. 275,(Hague, 1952).

At the Conference of the International Law Association of 1950, however, the same writer noted that some of the declarations and decrees which claim an extension of the coastal state's sovereignty would clash with the development of modern international law which progresses a limitation of sovereignty. He further pointed out that unilateral proclamations do not generate customary international law. (*Report of the Forty-Fourth Conference*, p.114, Copenhagen, 1950).

In the proposals of the Committee on Rights to the Seabed and its Subsoil submitted to the International Law Association at its forty-fourth Conference, held in 1950, it was stated that

> ...control and jurisdiction over the seabed and subsoil of the continental shelf outside territorial waters can be vested in the coastal state by effective occupation.[228]

It was further noted that the affirmation of the principle of effective occupation should not

> be interpreted as a rejection of the possibility that control and jurisdiction over the seabed and subsoil of the continental shelf outside territorial waters vest *ipso jure* in the coastal state by a proclamation to this effect.[229]

This proposal received strong opposition at the same Conference of the Association and as it was noted by its rapporteur it appeared "impossible to formulate...a resolution which would be supported by a majority sufficiently impressive as to be regarded as the joint opinion of the Association."[230] The proposal was finally rejected.

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[227] J. L. Kunz, "Continental Shelf and International Law: Confusion and Abuse", 50 Am. J. Int. L. 828, at 832.

[228] Report of the Forty-Fourth Conference, pp. 133-135, (Copenhagen, 1950).

[229] Ibid., at 133.

[230] Ibid., at 117.

At the next Conference of the Association, held at Lucerne in 1952, even more speakers opposed treating the continental shelf doctrine as recognized by international law,[231] and little change was seen at the next Conference, held in Edinburgh in 1954, where an affirmative recommendation of the continental shelf doctrine as lex ferenda was adopted.[232]

The International Law Commission seemed reluctant to admit that a customary rule evolved from the state practice on the continental shelf. In his fourth Report on the Regime of the High Seas, prepared in 1953, J. P. A. Francois, special rapporteur of the Commission, noted:

> Though numerous proclamations have been issued over the past decade, it can hardly be said that such unilateral action has already established a new customary rule. It is sufficient to say that the principle of the continental shelf is based upon general principles of law which serve the present day needs of the international community.[233]

The same view was expressed by the International Law Commission in its commentary on the Draft Articles on the Continental Shelf, prepared in 1951,[234] and was reiterated in 1953 in the Commission's Report to the General Assembly, which included a second Draft of Articles on the Continental Shelf with accompanying comments.[235] It was noted, however, in the 1953 Report that

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[231] Report of the Forty-Fifth Conference, (Lucerne, 1952), pp. 147-156. See, e.g., the views expressed by Waldock, Gihl, Colban, Eustathiades, and Ryhg.

[232] Report of the Forty-Sixth Conference, (Edinburgh, 1954), p. viii.

[233] U.N. Doc.A/CN.4/60, February 19, 1953, p. 125.

[234] (1951) I.L.C. Yearbook 142, (vol. II).

> ...once the sea-bed and subsoil have become the object of active interest to States with the view to the exploration and exploitation of their resources, it is not practicable to treat them as res nullius, i.e. capable of being acquired by the first occupier.[236]

In its Report to the General Assembly, prepared in 1956, the Commission, although it maintained the view that the "sovereign rights" attributed to the coastal state in the Draft Articles on the Continental Shelf could not be based on state practice as evidence of a customary rule, it considered state practice "to be supported by considerations of law and of fact".[237]

Opposition to the view that the continental shelf doctrine received the status of a customary rule was also voiced by Lord Asquith of Bishopstone in his arbitral award in Petroleum Development (Trucial Coast) Ltd. v. the Ruler of Abu Dhabi, handed down in 1951. He opined that neither the practice of states nor the pronouncements of jurists give any certain and consistent answer to the question whether claims to the continental shelf are recognized by international law and he pointed out that

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[235] (1953) I.L.C. Yearbook 214, (vol. II).

[236] Ibid., at 215.

[237] (1956) I.L.C. Yearbook 298, (vol. II).

> there are in this field so many ragged ends and unfilled blanks, so much that is merely tentative and exploratory, that in no form can the doctrine claim as yet to have assumed hitherto the hard lineaments or the definitive status of an established rule of international law.[238]

He noted, however, that the continental shelf doctrine is acceptable de lege ferenda and considered it expedient to vest the coastal state with sovereign rights over its continental shelf, instead of treating the seabed as "a res nullius - 'fair game' for the first occupier", which, he thought, would invite a perilous scramble.[239]

At the 1954 Conference of the International Law Association Professor L. C. Green pointed out that the unilateral declarations on the continental shelf

> are to a great extent consistent in character and they may well be said to indicate a clear trend in a certain direction evidencing what a large number of maritime states regard the law as probably being.[240]

Referring to Lord Asquith's finding in the aforementioned Abu Dhabi arbitration, Professor Green noted that he preferred "the consistent practice of interested states to the single finding of a sole arbitrator in a case between a Trucial Chief and a commercial company, even though it may be based on international law."[240]

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[238] 1 Int. Comp. L. Q. 247, at 256, (1952); (1951) International Law Reports 144, at 155.

[239] Ibid., at pp. 256, 257; Ibid., at 156.

[240] Report of the Forty-Sixth Conference, (Edinburgh, 1954), p. 422.

In its decision in the North Sea Continental Shelf Cases the International Court of Justice upheld the view that independently of the Geneva Convention on the Continental Shelf of 1958

> ...the rights of the coastal state in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the sea-bed and exploiting its natural resources. In short, there is here an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared...but does not need to be constituted.[241]

The Court also pointed out that Articles 1, 2, and 3 of the Geneva Convention on the Continental Shelf[242] were regarded in 1958

> ...as reflecting or as crystallising, received or at least emergent rules of customary international law relative to the continental shelf, amongst them the question of the seaward extent of the shelf; the juridical character of the

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[240] Ibid.

[241] (1969) I.C.J. Rep. 3, at 22.

[242] The continental shelf doctrine has been entrenched in Article 2 (1-3) of the convention. (499 U.N.T.S. 311).

> coastal State's entitlement; the nature of the rights exercisable; the kind of natural resources to which these relate; and the preservation intact of the legal status as high seas of the waters over the shelf and the legal status of the superjacent airspace.[243]

The same view was held by Judge Tanaka in his dissenting opinion, where he pointed out that the fundamental concept of the continental shelf, expressed in Articles 1, 2 and 3 of the Geneva Convention on the Continental Shelf, was formulated on the basis of state practice which was established since the United States Proclamation on the continental shelf of 1945 and has, accordingly, the character of customary law. He further noted:

> ...even those states which have not ratified or acceded to the Convention (on the Continental Shelf) could not deny the validity of these provisions against them. Denying the principles enunciated in Articles 1-3 would deprive the non-contracting States of the basis of all rights over their continental shelves.[244]

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[243] Supra, n. 241, at 39.

[244] Ibid., at 180.

2. The Geneva Convention on the Continental Shelf.

The Geneva Convention on the Continental Shelf of 1958[245] struck an equitable balance between the specific interests of the coastal state and the general interests of the international community of states. It adopted the continental shelf doctrine, by which the coastal state is vested with sovereign rights over its continental shelf for the purpose of exploring it and exploiting its natural resources, without affecting the established legal order of the high seas, thus achieving an accomodation between the coastal state's rights over its continental shelf and certain rights of third states and of the international community at large which have been traditionally safeguarded by the principle of the freedom of the high seas, such as navigation, overflight, the laying of submarine cables and pipelines, fishing and oceanographic research. These main features of the Convention are actually a codification of pre-existing customary law.

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[245] U.N. Doc.A/CONF.13/L.55; 499 U.N.T.S. 311.

The Convention was adopted by the United Nations Conference on the Law of the Sea of 1958, by 57 votes to 3, with 8 abstentions, on April 26, 1958. (United Nations Conference on the Law of the Sea, 2 Official Records, pp. 142-143). The Conference was convened by the Secretary General of the United Nations, pursuant to General Assembly Resolution 1105 (XI), of February 21, 1957, which referred to the recommendation of the International Law Commission, contained in its 1956 Report to the General Assembly,

> ...that an international Conference of plenipotentiaries should be convoked to examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem, and to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate.

The Conference was attended by delegates from eighty-six countries and adopted three more conventions on the law of the sea, namely, the Convention on the Territorial Sea and the Contiguous Zone, (516 U.N.T.S. 205), the Convention on the High Seas, (450 U.N.T.S. 82), and the Convention on Fishing and Conservation of the Living Resources of the High Seas, (559 U.N.T.S. 285).

The Convention on the Continental Shelf came into force on June 10, 1964, following the deposit of the twenty-second instrument of ratification, according to Article 11. It was ratified by Canada on February 6, 1970, with effect as of March 8, 1970.

The Convention further adopted a definition of the continental shelf and its resources and comprised rules dealing with its delimitation between adjacent states, whose coasts have a common lateral boundary or are opposite to each other.

The Convention consists of fifteen articles, seven of which are devoted to substantive matters, while the rest deal with procedural and formal subjects. It follows closely the third Draft of Articles on the continental shelf prepared by the International Law Commission in 1956, which forms Articles 67-73 of the Commission's third Draft of Articles on the Law of the Sea.[246] These Articles was the basic working paper of the Geneva Conference on the Law of the Sea of 1958.

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[246] (1956) I.L.C. Yearbook 295, (vol. II).

Six of the Commission's Draft Articles on the continental shelf were adopted by the Convention together with some proposals submitted by states during the Geneva Conference and additional matter taken from the Commision's commentaries to its Draft Articles. Article 73 of the Commission's Draft, which provides for the settlement of disputes by the International Court of Justice or by other peaceful means, was not adopted by the Convention. The Convention adopted instead an Optional Protocol concerning the compulsory settlement of disputes, which applies to all four Conventions adopted by the Conference,[247] with the exception of disputes arising from Articles 4-8 of the Convention on Fishing and the Conservation of the Living Resources of the High Seas on which Articles 9-12 of this Convention apply.[248]

(1) The Definition of the Continental Shelf.

The continental shelf is defined in Article 1 of the Convention on the Continental Shelf, which reads:

> For the purpose of these articles, the term 'continental shelf' is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

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[247] See supra, n. 247.

[248] U.N. Doc.A/CONF.13/L.57, Article 11; 450 U.N.T.S. 169, Article 11.

The significant features of this definition are first the exclusion from the continental shelf concept of the superjacent waters, which according to Article 3 of the Convention preserve their legal status as high seas, and second, the application of the term "continental shelf" in a sense wider than its geographical connotation, since it also encompasses submarine areas adjacent to the coast, which either nowhere reach a 200-meter depth or, although they exceed that depth, they are accessible for exploitation.

The exploitability criterion was included in the definition to conform to the wishes of coastal states which have very limited or no continental shelf in the geographical sense. As it was noted by the rapporteur of the International Law Commission in his first Report on the Regime of the High Seas, the delimitation of the area of the continental shelf in terms of water depth would be unfair for states with little or no shelf in the geographical sense.[249]

It should be noted,however, that the exploitability criterion introduces a continuing uncertainty about the precise extent of the continental shelf, since the capability of exploitation is a variable factor which is dependent on the state of technology at a certain time. Although it has the advantage of flexibility in that it can adjust to the needs of advancing technology, it might eventually lead to the inclusion within the coastal state's continental shelf of vast areas of seabed situated at great distances from the coast, given also the vagueness of the restraining qualification of the term continental shelf as submarine areas "adjacent to the coast". The shortcomings of this criterion become more evident in the light of the present state of technology, which made parts of the deep ocean floor accessible for exploitation. It should be also noted in this context that the precise delimitation of the outer limit of the continental shelf has become more urgent, in view of recent developments towards the establishment of a legal regime for the seabed beyond the limits of national jurisdiction, which has been declared by the United Nations General Assembly as the "common heritage of mankind".[250]

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[249] J. P. A. Francois, Report on the Regime of the High Seas, U.N. Doc.A/CN.4/17, pp. 39-40, (1950).

The definition of the continental shelf adopted by the Convention is identical to the one contained in Article 67 of the third Draft Articles on the Law of the Sea, prepared by the International Law Commission in 1956.[251]

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[250] Resolution 2749 (XXV), of December 17, 1970. The legal regime of the seabed beyond the limits of national jurisdiction will be examined in Chapter VII.

[251] (1956) I.L.C. Yearbook 296, (vol. II).

Like all definitions prepared by the International Law Commission and every other legal definition of the continental shelf, it refers only to submarine areas beyond the limit of the territorial sea, since "submarine areas beneath territorial waters are, like the waters above them, subject to the sovereignty of the coastal state".[252]

The second paragraph of this definition originates from a proposal tabled by the Philippines, which was the only one to command a majority in Committee IV of the Geneva Conference.[253]

Defeated proposals to amend the definition of the continental shelf of Article 1 of the Convention include the proposal of Yugoslavia to delimit the shelf by a 550-meter depth contour line, which would not extend beyond a distance of 100 miles from the outer limit of the territorial sea,[254] the joint proposal of France and Lebanon to delete the exploitability criterion,[255] the Canadian proposal, which was seconded by Germany, to retain the 200-meter contour line and add the alternative criterion of the shelf edge,[256] and the Korean proposal to adopt only the exploitability criterion.[257]

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[252] Commentaries of the International Law Commission to its first Draft Articles on the continental shelf, (1951) I.L.C. Yearbook 141, (vol. II). See also Article 2 of the Convention on the Territorial Sea and the Contiguous Zone, 516 U.N.T.S. 205.

[253] U.N. Doc.A/CONF. 13/C.4/SR.19, p. 4.

[254] Ibid., p. 2.

[255] U.N. Doc.A/CONF.13/C.4/L.7.

[256] Supra, n. 253, pp. 2, 3.

The initial attempts to form a definition of the continental shelf to suit the various geomorphological configurations of the submarine areas in different parts of the globe were made by the International Law Commision in its preparatory work on the continental shelf.

In its first Draft Articles on the continental shelf the Commission departed from the geographical concept of the continental shelf and rejected the criterion of the 200-meter water depth contour line. The Commission employed the exploitability criterion in its original definition of the continental shelf.[258] In its accompanying commentary the Commission noted that the varied use of the geographical concept of the continental shelf by scientists is an obstacle to its adoption as a basis for legal regulation. It would lead, it added, to a discriminatory legal system, since it would not apply to submarine areas which, although exploitable, do not form part of a geographical continental shelf.[259] Referring to the rejection of the 200-meter water depth criterion the Commission noted that although it was at that time sufficient for all practical needs, it would have the disadvantage of instability since future technical developments might make exploitation possible at greater depths. "Moreover, the Continental Shelf might well include submarine areas lying at a depth of over 200 metres but capable of being exploited by means of installations erected in neighbouring areas where the depth does not exeed this limit."[260]

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[257] U.N. Doc.A/CONF.13/C.4/L.4.

[258] (1951) I.L.C. Yearbook 141, Article 1, (vol. II).

[259] Ibid.

In 1953 the Commission reversed its position and adopted the 200-meter water depth criterion in its second Draft Articles on the continental shelf. The Commission's special rapporteur re-examined the definition adopted in the first Draft Articles and in the light of observations received from eighteen governments, at least half of which called fcr a precise outer limit,[261] submitted a further report on the subject,[262] where he advocated the 200-meter water depth criterion. In justifying his departure from the Commission's first definition the rapporteur stressed that the exploitability test might create considerable problems by allowing the exclusive rights of the coastal state to be extended to unlimited depths and unlimited distances from the coast. Although he admitted that there is force in the arguments in favour of the exploitability test, he considered it expedient to adopt at least a provisional limit, which might be re-adjusted if technical developments so require.[263] Similar arguments in support of the 200-meter water depth criterion were advanced by the International Law Commission in its commentaries to the second Draft Articles on the continental shelf.[264]

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[260] Ibid.

[261] (1953) I.L.C. Yearbook, pp. 241-269, (vol. II).

[262] J. P. A. Francois, Fourth Report on the Regime of the High Seas, 19 February, 1953, (U.N. Doc.A/CN.4/60), ibid., 1, at 37.

In its third Draft Articles on the continental shelf, prepared in 1956,[265] the Commission adopted a new definition of the continental shelf combining the two previous criteria. As it has been noted , this last definition was finally incorporated in the Convention. In its commentary to the new draft definition the Commission referred to the Resolution adopted by the Inter-American Specialized Conference on "Conservation of Natural Resources: Continental Shelf and Oceanic Waters",held at Ciudad Trujillo in the Dominican Republic in March, 1956, which stated that the rights of the coastal state should be extended beyond the 200-meter depth contour line and advocated the exploitability criterion for the delimitation of the outer limit of the continental shelf.[266]

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[263] Ibid., at 38.

[264] Supra, n. 261, pp. 213-214.

[265] (1956) I.L.C. Yearbook 296, (vol. II).

[266] Ibid.

Commenting on this Resolution Garcia Amador noted that the exploitability criterion was

> ...designed to place all coastal states on an equal footing with respect to the submarine areas adjacent to their respective territories...The geographical configuration of the bed of the sea contiguous to the coast of continents and islands is sometimes so irregular that it cannot be defined in terms of the shelf or terrace concepts. When this is so, as in the case of some countries in the American continent and elsewhere, the coastal state may exercise the same exclusive rights now enjoyed by those which have a continental or insular shelf and terrace, provided the depth of the superjacent waters admits of the exploitation of the natural resources of the sea bed and subsoil and that the submarine area be adjacent to the territory of the coastal state.[267]

Some members of the Commission voiced their opposition to the proposal to embody the exploitability criterion in the definition of the continental shelf because they thought that it would impair the stability of the outer limit of the continental shelf which was defined in the 1953 Draft on the basis of the 200-meter water depth criterion. The majority of the Commission, however, eventually decided to add the exploitability criterion to the definition adopted in 1953.[268]

It may be noted that the exploitability test is an objective criterion in the sense that the coastal state need not have its own technological means in order to claim rights out to the maximum depth which is accessible for exploitation anywhere in the world. Thus, the continental shelf boundaries of a less developed country can be extended to the farthest range capable of exploitation by the most technologically advanced country.

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[267] Garcia Amador, The Exploitation and Conservation of the Resources of the Sea,p. 108, (Leyden, 1963).

[268] Supra, n. 265, pp. 296-297.

The opposite interpretation would contravene the principle of equality which inspires the Convention, as well as the principle of sovereign equality of states. For it would mean that there should be one definition of the continental shelf for technologically advanced countries and another for undeveloped countries. It would also contravene Article 2(3) of the Convention which provides that the coastal state's rights to its continental shelf are not affected by its failure to exploit it.

It is also worth noting that a state's capability of exploitation is not necessarily dependent upon its state of technology, since the continental shelf can be exploited through the employment of the services of technologically advanced countries. It should be born in mind that oil exploitation on the continental shelf of technologically undeveloped countries is carried out by foreign corporations which in some cases operate in concert with local interests.[269]

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[269] In favour of the exploitability criterion and its objective interpretation suggested here are McDougal and Burke, although they admit that the establishment of a more precise limit is necessary. In their view the vagueness of this criterion seems less likely to cause subsequent conflict than would a precise criterion which "would limit (continued on next page.)

(2) The Rights of the Coastal State.

Article 2(1-3) of the Convention reflects the continental shelf doctrine which had assumed the status of a customary rule before the adoption of the Convention. The first paragraph of this Article is identical to Article 68 of the third Draft Articles on the continental shelf, prepared by the International Law Commission in 1956.[270] It reads:

> The coastal state exercises over the continental shelf sovereign rights for the purpose of

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(continued from page 125.)
coastal authority to only part of an exploitable area and perhaps permit completely free and uncontrolled access by others to areas beyond coastal control but still of particular concern to the coastal state." (Myres S. McDougal and William T. Burke, The Public Order of the Oceans, p. 687, New Haven and London: Yale University Press, 1962).

S. Oda, arguing against, holds the extreme view that under the exploitability criterion "all the submarine areas of the world have been theoretically divided among the coastal states at the deepest trenches. This is the logical conclusion to be drawn from the provision approved at the Geneva Conference". (S. Oda, "Proposal for Revising the Convention on the Continental Shelf", 7 Col. J. Transnat. L. 1, at 9, (1968)). It should be noted that this view does not take into account the restrictive element of adjacency of Article 1 of the Convention. However vague this element might be, it would never justify the assertion of rights to the deep ocean floor over, say, 300 or 400 miles distant from the coast, especially if the geographical continental shelf and its continuation (continental slope and rise) do not extend to that limit. As Lauterpacht noted during the discussions on the subject by the International Law Commission, it is important to prevent exploitation at say 200 or 500 miles from the coast. ((1953) I.L.C. Yearbook 77, (vol.I)). Louis Henkin noted in this respect that 200 miles from the coast is a "generous distance". (Louis Henkin, Law of the Sea's Mineral Resources, p. 43, (1968)).

[270] Supra, n. 265.

exploring it and exploiting its natural resources.[271]

The International Law Commission was shown reluctant to use the term "sovereign rights", fearing that the recognition of sovereign rights to the coastal state might lead to encroachments upon the rights of third states regarding the free use of the superjacent waters and the airspace above.[272] This precaution, however, did not seem justified in view of the special character and scope of these sovereign rights, which, as it is explicitly stated in Article 2(1) of the Convention, are confined only to the exploration and exploitation of the continental shelf. Moreover, Article 3 of the Convention safeguards the legal status of the superjacent waters as high seas, as well as that of the airspace above these waters.

The second paragraph of Article 1 stresses the exclusive character of the coastal state's rights over its continental shelf and provides that if the coastal state fails to exercise them, no one may assume exploration and exploitation of or make a claim to the continental shelf without the express consent of the coastal state. This provision safeguards the coastal state's rights erga omnes and apparently excludes the acquisition of prescriptive rights to the continental shelf by third states.

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[271] Supra, n. 245.

[272] Supra, n. 265, at 297, commentary to Article 68. In the Commission's first Draft Articles on the continental shelf, prepared in 1951, did not employ the term "sovereing rights". It read:

> The continental shelf is subject to the exercise by the coastal State of control and jurisdiction for the purposes of exploring and exploiting its natural resources.

In the respective commentary it was noted that this Article "excludes control and jurisdiction independently of the exploration and exploitation of the resources of the seabed and subsoil."
((1951) I.L.C. Yearbook, pp. 141-142, (vol. II)).

The third paragraph of the same Article confirms the ipso jure character of the coastal state's rights to its continental shelf. It declares that these rights "do not depend on occupation, effective or notional, or on any express proclamation".

Article 5(2-5) of the Convention confers upon the coastal state the right to construct installations on the continental shelf for the exploitation of its natural resources and to establish safety zones up to a distance of 500 meters around the installations. It is further specified that such installations, although under the jurisdiction of the coastal state, do not possess the status of islands and consequently they have no territorial sea, nor are they taken into consideration for the delimitation of the coastal state's territorial sea. By paragraph 5 of the same Article the coastal state is required to give due notice for the construction of such installations, to maintain "permanent means for giving warning for their presence" and to remove any abandoned or disused installations.

It may be noted that these safety measures with respect to the construction and maintenance of installations are especially important for areas which are highly frequented by international navigation, such as the Mediterranean and the North Sea.

(3) Safeguards for the Rights of Third States.

One of the basic problems the Geneva Conference had to face in drafting the Convention on the Continental Shelf was to ensure that the exclusive rights of the coastal state should not impair the rights of third states in the use of the waters and airspace above the continental shelf.

The International Law Commission's first and second Draft Articles on the continental shelf, prepared in 1951 and 1953 respectively, embodied provisions safeguarding ~~the~~ legal status of the superjacent waters as high seas.[273] From this it could be implied *a fortiori* that the freedom of overflight was also to be safeguarded. In its 1956 Draft Articles, however, the Commission expressly preserved the right to overfly the continental shelf.[274] In its commentary to this latter Draft the Commission noted:

> The articles on the continental shelf are intended as laying down the regime of the continental shelf, only as subject to and within the orbit of the paramount principle of the freedom of the seas and of the airspace above them. No modification of or exception to that principle are admissible unless expressly provided for in the various articles.[275]

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[273] (1951) I.L.C. Yearbook 142, and ibid., (1953), at 212.

[274] (1956) I.L.C. Yearbook 298, Article 69.

[275] Ibid.

Article 3 of the Convention, repeating verbatim Article 69 of the Commission's 1956 Draft, stipulates:

> The rights of the coastal state over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters.

Articles 4 and 5(1) of the Convention embody special provisions safeguarding the basic special manifestations of the principle of the freedom of the high seas referred to in Article 3.[276] Thus, Article 4 provides that, subject to its right to take reasonable measures for the exploitation of the continental shelf "the coastal state may not impede the laying or maintenance of submarine cables or pipelines on the continental shelf."[277]

Even more important freedoms are protected by Article 5(1) which provides:

> The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea, nor result in any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication.

As it has been noted above[278] the freedom of fishing within a zone of 200 miles from the coast seems to have yielded to the prevailing interests of the coastal state regarding the conservation and management of the living resources of the seas adjacent to its shores. This is attested by the recent establishment of 200-mile fishing zones and their subsequent acceptance by the generality of states. The freedom of fishing, however, remains unimpaired in the waters overlying the continental shelf beyond the 200-mile fishing zone.

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[276] See also Article 2 of the Geneva Convention on the High Seas of 1958, enumerating the basic special manifestations of the principle of the freedom of the high seas. (450 U.N.T.S. 82).

[277] This right is also safeguarded by Article 26(2) of the Convention on the High Seas. Ibid.

[278] See supra, pp. 63-64.

Article 5(6) further provides that the installations and the safety zones around them, referred to in Article 5(2), may not be established "where interference may be caused to the use of recognized sea lanes essential to international navigation." Paragraph 7 of the same Article imposes upon the coastal state the duty "to undertake, in the safety zones, all appropriate measures for the protection of the living resources of the sea from harmful agents."

(4) The Convention's Stand towards the Problem of Scientific Research on the Continental Shelf. The Position of the Third United Nations Conference on the Law of the Sea.

By Article 5(8) of the Convention on the Continental Shelf, any research on the continental shelf requires the consent of the coastal state. The same Article further provides that if the request for research is submitted by a qualified institution intending to engage in research into the physical or biological characteristics of the continental shelf, the coastal state "shall not normally withhold its consent", provided that it shall have the right to participate in the research and that the results of the research shall be published.

It may be noted that it is doubtful whether the expression "shall not normally withhold its consent" contemplates the imposition of a duty upon the coastal state to grant its consent. Even if there were a duty, however, "(o)ne can readily imagine that permission may often be refused or so delayed that the effort required to gain permission will exceed the effort needed for actual sampling. In one instance...permission to enter claimed territorial waters was delayed by suspicion about possible military motives."[279]

In view of the recent progress in seismic profiling regarding the ocean floor and the invention of the deep-diving submarines the provision of Article 5(1) of the Convention on the Continental Shelf, which safeguards the freedom of scientific research in the waters over the shelf, may also be of value for research on the shelf. Deep-diving submarines can approach the seabed, while being engaged in scientific research in the superjacent waters, although research on the continental shelf would be restricted to close observation of the seabed, since it could not include the taking of samples of any resources of the continental shelf, which by the Convention appertain to the coastal state.

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[279] K. O. Emery, "Geological Aspects of Sea-Floor Sovereignty", in Lewis M. Alexander, The Law of the Sea, p. 156, (Ohio State University, 1967).

The problem of scientific research on the continental shelf was also disposed of by the Third United Nations Conference of the Law of the Sea. As it appears from the proposals in the Informal Composite Negotiating Text, prepared by the Conference during its Sixth Session held in New York in May and July 1977,[280] the freedom of scientific research on the continental shelf is less protected than in the Geneva Convention.

That an increasing polarization between developed and developing countries exists on the question of scientific research, the former advocating complete freedom of scientific research on the ground that it is an expression of the principle of the freedom of the high seas, and the latter favouring complete control of such research by the coastal state, by reason of its sovereign rights over its continental shelf, is evident from the discussions during the Second Session of the Conference, which was held in Caracas in 1974.[281] The point of view of the developing countries is reflected in the following statement:

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[280] Third United Nations Conference on the Law of the Sea, VIII Official Records, Doc.A/CONF.62/WP.10. This Document originates from the Informal Single Negotiating Text, prepared by the Conference during its Third Session, held in Geneva in 1975, (Doc.A/CONF.62/WP.8), as revised during the Fourth Session of the Conference, held in New York in 1976, (Doc.A/CONF.68/WP.8/REV.1, Revised Single Negotiating Text).

> Research is still carried out under national auspices of a few highly developed and rich nations. Freedom of scientific research, then, inevitably means freedom of research for the rich nations. It is understandable that other nations, not able to participate and not tangibly benefiting from such research, are not overly concerned about this freedom, which they resent as an interference with their sovereignty or as a pretext for exploitation.[282]

According to the Informal Composite Negotiating Text the consent of the coastal state is needed for any scientific research on the continental shelf as well as within the proposed 200-mile economic zone.[283] Article 247(3) of the Text provides that coastal states shall grant their consent "in normal circumstances" when the scientific research is carried out "for peaceful purposes and in order to increase scientific knowledge of the marine environment for the benefit of all mankind" and that "coastal states shall establish rules and procedures ensuring that such consent will not be delayed or denied unreasonably."[284] Paragraph 4 of the same Article, however, vests the coastal state with the discretionary right to withhold its consent for four alternative reasons mentioned in subparagraphs a-d. Even the first of these reasons alone would suffice to render nugatory the aforementioned provision of Article 247(3). According to it the coastal state may withhold its consent if the proposed research "is of direct significance for the exploration and exploitation of natural resources, whether living or non-living".[285] Under this general proviso the coastal state could refuse almost any permission for scientific research. So much is this so that, by Article 265 of the Text,[286] disputes arising from the exercise by the coastal state of a right or discretion in accordance with Article 247 are exempted from the procedure for Settlement of Disputes contemplated in the second part of section XV of the Text.[287]

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[281] Ibid., II Official Records, pp. 335-354, (Second Session, 7th-9th meetings of the Third Committee). The Burmese delegate to the Conference noted that "past experience had shown that marine scientific research was not completely immune to the dictates of politics and big business." Ibid., at 338.

[282] E. M. Borgese, "The Seas: A Common Heritage", 5 The Center Mag. 13, at 21, (1972).

[283] Supra, n. 280, Article 247(1-2), p. 42.

[284] Ibid.

While Article 5(8) of the Convention on the Continental Shelf provides that "the coastal state shall not normally withhold its consent" in cases of scientific research similar to those mentioned in Article 247(3) of the Text, although it leaves some doubts as to whether it imposes a duty upon the coastal state, Article 247(4)(a) of the Text facilitates the refusal of research permission by the coastal state, by including the aforesaid general proviso which overhangs the freedom of scientific research like the Sword of Damocles.

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[285] Ibid.

[286] Ibid., p. 44.

[287] Ibid., pp. 46-48.

3. The Third United Nations Conference on the Law of the Sea.

The future regime of the continental shelf seems to be closely interlinked with the various proposals made at the Third United Nations Conference on the Law of the Sea regarding the extension of the coastal state's rights over the marine resources off its coasts and the nature of the legal regime to be adopted for the seabed beyond the limits of national jurisdiction. The trend to extend the coastal state's jurisdiction is reflected in the recent establishment of 200-mile fishing zones and especially in the 200-mile economic zone proposal.

According to the draft Articles on the economic zone contained in the Informal Composite Negotiating Text[288] the coastal would have within this zone, among other rights, sovereign rights for the purpose of exploring and exploiting the natural resources of the seabed and subsoil and the superjacent waters.[289] It appears from this that the part of the continental shelf which is included within the proposed 200-mile economic zone would in practice be absorbed into that zone and would no longer exist as a special regime.

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[288] Supra, n. 280.

[289] Ibid., Article 56(a).

The movement towards the establishment of a legal regime for the deep seabed has a direct correlation with the problem of the delimitation of the outer boundary of the continental shelf, since the landward boundary of the deep seabed would coincide with the seaward boundary of the continental shelf.

In Resolution 2749(XXV) the United Nations General Assembly declared that the seabed beyond the limits of national jurisdiction is the common heritage of mankind and should be exploited for the benefit of mankind as a whole, irrespective of the geographical location of states, taking into particular consideration the needs of the developing countries.[290]

The First Committee of the Third United Nations Conference on the Law of the Sea, taking into account the work of the Ad Hoc Seabed Committee[291] and the subsequent Seabed Committee[292] prepared three drafts of Articles on the deep seabed area.[293] All three drafts of Articles confirm that the deep seabed, for which the term "Area" is used, and its resources are the common heritage of mankind[294] and as such should be reserved for peaceful purposes and should be used for the benefit of mankind as a whole. In order to implement the principle of common heritage it is proposed to establish an international agency, called the "International Seabed Authority", through which states shall administer the Area.[295]

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[290] The Resolution was adopted on December 17, 1970. The idea to declare the deep seabed as "the common heritage of mankind" was initiated by Arvid Pardo, Malta's representative to the United Nations, who requested the inclusion of this supplementary item on the agenda of the twenty-second session of the General Assembly, on August 17, 1967:

> Declaration and Treaty concerning the reservation for peaceful purposes of the sea bed and of the ocean floor underlying the seas beyond the limits of present national jurisdiction, and the use of their resources in the interest of mankind. (U.N. Doc.A/6695, XXII).

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[291] The Ad Hoc Seabed Committee was established in 1967, in pursuance to General Assembly Resolution 2340 (XXII), to study the peaceful uses of the seabed and the ocean floor beyond the limits of national jurisdiction. It consisted of 35 states.

[292] The Seabed Committee was established in 1968, in pursuance to General Assembly Resolution 2467 (XXIII), and was instructed to study the elaboration of legal principles which would promote international co-operation in the exploration and use of the deep ocean floor and to ensure the exploitation of its resources for the benefit of mankind. The Committee was originally composed of 42 members and was enlarged by 44 members in 1971 by General Assembly Resolution 2750 (XXV).

[293] The most recent draft of Articles on the subject is contained in part XI of the Informal Composite Negotiating Text, prepared by the Conference during its Sixth Session which was held in New York in 1977, (U.N. Doc.A/CONF.62/WP.10, Articles 133-192). The other two drafts of Articles are contained in Part I of the Informal Single Negotiating Text and in Part I of the Revised Single Negotiating Text, prepared by the Conference in 1975 and 1976 respectively, (see supra n. 280).

[294] Informal Composite Negotiating Text, Articles 136, 140, 141; Informal Single Negotiating Text, Part I, Articles 3, 7, 8; Revised Single Negotiating Text, Part I, Articles 3, 7, 8. See also supra, n. 280.

With respect to the deep seabed areas which are contiguous to the outer limits of the national continental shelf, Article 142 of the Informal Composite Negotiating Text provides that exploitation activities in such areas "shall be conducted with due regard to the rights and legitimate interests of any coastal State across whose jurisdiction such resources lie."[296]

With respect to the definition of the continental shelf, it may be noted that the Conference has abandoned the 200-meter water depth criterion and the exploitability test of the Geneva Convention as a basis for the delimitation of the outer limit of the continental shelf, and proposed instead a fixed distance of 200 miles from the baselines from which the breadth of the territorial sea is measured. The Conference further proposed to allocate to the coastal state the natural prolongation of the continental margin which extends beyond the 200-mile limit.[297]

The main difference between this definition and the one adopted by Article 1 of the Geneva Convention on the

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[295] Supra, n. 280, Article 155.

[296] Ibid., Article 142.

[297] Ibid., Article 76. See also supra, pp. 2-3.

Continental Shelf is that under the former definition the outer limit of the continental shelf cannot extend beyond the 200-mile limit if the continental margin does not exceed that limit, regardless of whether the submarine areas beyond this limit are accessible for exploitation.

In regard to the part of the proposed definition by which the continental margin is alloted to the coastal state even if it exceeds the 200-mile limit, it may be noted that the term "continental margin" is employed in its strict geographical meaning. Consequently , it will be a question of geography or geology to decide whether the submarine areas beyond the 200-mile limit form part of the prolongation of the coastal state's land territory towards the outer edge of the continental margin.[298]

Article 82 of the Informal Composite Negotiating Text provides that the coastal state shall make payments or contributions in kind to the International Seabed Authority in respect of the exploitation of the non-living resources of the part of the continental shelf beyond the

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[298] In some instances the outer part of the continental margin, i.e. the continental slope and especially the continental rise extend up to 600 miles from the coast. The importance of the upper part of the continental rise lies in its potential value in oil resources, (see K. O. Emery, supra, n. 279, p. 151). As to the exact boundary of the continental rise even geology itself speaks with a voice of uncertainty. The outer limit of the continental rise cannot be precisely defined, because this area is the joining place of two different elements, i.e., of the submerged continent on the one hand and the deep ocean floor on the other, which in some cases overlap. (See V. E. McKelvey and Frand W. H. Wang, World Subsea Mineral Resources, p. 9, Washington D.C., 1969).

200-mile limit. The payments and contributions will commence at the sixth year of production at a particular site and will consist of one per cent of the annual value or volume of production at the particular site. It is further provided that the rate will increase by one per cent for each subsequent year until the tenth year and will remain at five per cent thereafter.[299] Paragraph 3 of the same Article exempts developing countries which are net importers of a mineral resource produced from their continental shelves from making payments or contributions in respect of that mineral resource.

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[299] U.N. Doc.A/CONF.62/WP.10, Article 82, supra n. 280.

CHAPTER VI

THE DELIMITATION OF THE CONTINENTAL SHELF BETWEEN NEIGHBOURING STATES.

The ever-increasing economic importance of the continental shelf and its expanding exploitation has brought into the surface the problem of its delimitation among neighbouring coastal states. As early as 1945, the United States Proclamation on the continental shelf, which inaugurated the subsequent state practice on the subject, anticipated the problem of delimitation and envisioned some useful principles for its solution. It stated:

> In cases where the continental shelf extends to the shores of another state, or is shared with an adjacent state, the boundary shall be determined by the United States and the state concerned in accordance with equitable principles.[300]

The Proclamation refers to the two main cases of delimitation of a common continental shelf, namely the delimitation between directly adjacent states having a lateral boundary and between states on opposite coasts. More complicated problems are involved in cases where islands belonging to one state are near the coasts of another whose area is comparatively larger than the one of the islands.

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[300] Presidential Proclamation 2667, of September 28, 1945, 10 Fed. Reg. 12303, (1945); 59 Stat. 884.

An example of delimitation before the promulgation of the United States Proclamation is the one effectuated by the Treaty between the United Kingdom and Venezuela, of February 26, 1942, regarding the delimitation of the submarine areas of the Gulf of Paria. (205 L.N.T.S. 121). It is noteworthy that the delimitation in this case was agreed before any assertion of rights to these submarine areas was made by either one of the parties. Each one of the parties subsequently annexed the submarine areas designated for it by the Treaty. (See also supra, pp. 25-26).

The Geneva Convention on the Continental Shelf has embodied rules on delimitation.[301] The question, however, of the applicable law, owing to the comparatively small number of states which have to date ratified the Geneva Convention on the Continental Shelf,[302] is not confined only to the examination of the conventional rules but comprises also the question whether any rules or principles of customary international law apply in cases of delimitation of the continental shelf between states not parties to the Geneva Convention, or between a state - party to the Convention and a state not party.

It should be noted from the outset that the problems concerning delimitation cannot be solved by the application of a general rule or a single method, due to the variety of the geomorphological structures of the continental shelves in different parts of the world and the dissimilar geographical configurations of the coasts.

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[301] 499 U.N.T.S. 311, Article 6.

[302] As of December 31, 1977, only 53 states out of over 160 states presently forming the world community of states had ratified, acceded to, or deposited notification of succession to the Geneva Convention on the Continental Shelf. Among them are Canada, France, the United Kingdom, the United States, and the U.S.S.R.. (Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions. List of Signatures, Ratifications, Accessions, etc., as at 31 December, 1977, U.N. Doc.ST./LEG./Ser.D/11, pp. 538-539).

1. The Problem of Delimitation before the International Law Commission.

When the International Law Commission started to deal with the question of the delimitation of the continental shelf between neighbouring states, it had in view the aforementioned excerpt from the United States Proclamation on the continental shelf[303] and the treaty between the United Kingdom and Venezuela regarding the delimitation of the submarine areas of the Gulf of Paria.[304] The Memorandum on the Regime of the High Seas, submitted by the Secretariat, quoted them.[305]

In the 1950 Session most members of the International Law Commission expressed the view that any substantive rule on delimitation "would be pure legal speculation which would jeopardize the whole of the Commission's work".[306] However, the Commission's Special Rapporteur proposed in his Second Report on the High Seas a draft Article on delimitation, which read:

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[303] Supra, n. 300.

[304] Ibid.

[305] U.N. Doc.A/CN.4/32, p. 108, (1950).

[306] (1950) I.L.C. Yearbook 234, par. 56, (vol. II).

> If two or more states are interested in the same continental shelf outside the territorial waters, the limits of the parts of the shelf belonging to each should be fixed by agreement between them. In the absence of agreement, the demarcation between the continental shelves of two neighbouring States should be constituted by the prolongation of the line separating the territorial waters, and the demarcation between the continental shelves of two States separated by the sea should be constituted by the median line between the two coasts.[307]

The Rapporteur added in a note that the lateral boundary might be a line perpendicular to the coast at the point where the land frontier reached the sea. To this Professor Hudson noted that "no such line existed either in law or in fact"[308] and agreed with chairman Brierly that "the Commission should lay down the essential rule that it was the duty of States to reach agreement".[309] Scelle, fearing that such a rule would authorize the stronger party to exert pressure on the weaker, suggested that, failing agreement, the states concerned should be either obliged to submit the matter to arbitration, or otherwise be prohibited to exploit the areas in dispute.[310]

The Commission finally decided to provide for compulsory arbitration and submitted the following draft

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[307] U.N. Doc.A/CN.4/42, p. 70, (1951).

[308] (1951) I.L.C. Yearbook 287, (vol.I).

[309] Ibid., at 286, Pars. 107, 114.

[310] Ibid., at 291, par. 33.

Article in its Report to the General Assembly of 1951:

> Two or more States to whose territories the same continental shelf is contiguous should establish boundaries in the area of the continental shelf by agreement. Failing agreement, the parties are under the obligation to have the boundaries fixed by arbitration.[311]

Whatever the legal value of the *pactum de contrahendo* might be, which, at any rate, does not impose an obligation upon the parties to reach an agreement, this draft Article, as Young noted,

> shows a wise appreciation of the impossibility of laying down any universal rule...Each situation is unique, and can be solved satisfactorily only in the light of its own facts and the particular interests there involved.[312]

In its report for the 1953 session of the International Law Commission the Special Rapporteur submitted a different text stating that the boundary of the continental shelf should be drawn according to the "principle of equidistance" in cases of adjacent states having a lateral boundary, and by employing the"median line"in cases of states whose coasts are opposite to each other.[313]

The "principle of equidistance" and the "median line" will be examined later. Suffice it to note at present that the "principle of equidistance" was introduced by the Rapporteur after he had received the answers to the questionnaire which was presented by him, in his capacity as Special Rapporteur on the "Regime of the Territorial Sea", to the Committee of Experts.[314] Question VII of the questionnaire read:

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[311] (1951) I.L.C. Yearbook 143, (vol. II).

[312] Richard Young, "The International Law Commission and the Continental Shelf", 46 Am. J. Int. L. 123, at 126, (1952).

[313] (1953) I.L.C. Yearbook 106, par. 37, (vol. I).

> How should the (lateral) boundary line be drawn, through the adjoining territorial sea of two adjacent states?[315]

The Rapporteur further suggested four alternative solutions, the fourth of which was the "equidistance line". The matter, therefore, was not put to the Committee of Experts as a question of continental shelf delimitation but as one of territorial sea delimitation. It was in this context that the Committee of Experts recommended the "principle of equidistance", adding also that "(i)n a number of cases this may not lead to an equitable solution, which should be then arrived at by negotiation."[316]

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[314] U.N. Doc.A/CN.4/61/Add.1, Annex, pp. 6-7; 4 Whiteman, Digest of International Law, pp. 907-908.

Question VI of the questionnaire referred to the delimitation of the territorial sea between states whose coasts are opposite to each other and whose territorial seas overlap. The Committee of Experts responded that the boundary "should as a general rule be the median line, every point of which is equidistant from the baselines of the States concerned." It also noted that in drawing the median line all islands should be taken into consideration, unless otherwise agreed between the states concerned.

[315] Ibid.

[316] Ibid.

The Special Rapporteur's proposal was rejected by the International Law Commission but the "equidistance principle" was not abandoned. Article 7(2) of the Commission's Draft Articles on the continental shelf, prepared in 1953, read:

> Where the same continental shelf is contiguous to the territories of two adjacent States, the boundary of the continental shelf appertaining to such States is, in the absence of agreement between those States or unless another boundary line is justified by special circumstances, determined by application of the principle of equidistance from the baselines from which the width of the territorial sea is measured.[317]

Article 7(1) of the same Draft referred to the delimitation of the continental shelf between states whose coasts are opposite to each other and employed the "median line" as a boundary. As in the case of lateral delimitation, this line would apply in the absence of agreement and unless another boundary line is justified by special circumstances.

The provisions of Article 7 were included, with minor modifications, in the Commission's final Draft of Articles on the continental shelf, prepared in 1956,[318] which served as a basis for the deliberations at the Geneva Conference on the Law of the Sea of 1958. Article 7 of the Commission's 1956 Draft was finally entrenched in the Geneva Convention on the Continental Shelf as Article 6.[319]

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[317] (1953) I.L.C. Yearbook 213, (vol. II).

[318] (1956) I.L.C. Yearbook 212, Article 7, (vol. II).

[319] 499 U.N.T.S. 311.

2. The Geneva Conference on the Law of the Sea of 1958 and the Convention on the Continental Shelf.

During the discussions at the Geneva Conference support for the "equidistance principle" was voiced by the representative of Colombia who opposed to the first sentence of the Commission's draft Article 7, which provided for the initiation of direct negotiations between the states concerned aiming at a delimitation agreement, as a first step.[320] He further noted that much future disagreement could be avoided if the equidistance principle were given precedence over private agreements.[321] Others expressed the view that the best solution is direct agreement between the states concerned, since no general rule would be satisfactory in all cases.[322] Between these views the Commission's draft Article 7 appeared as a compromise and was finally adopted by 39 votes to 2, with 15 abstentions,[323] and entrenched in the Geneva Convention on the Continental Shelf as Article 6. It reads:

> 1. Where the same continental shelf is adjacent to the territories of two or more states whose coasts are opposite each other, the

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[320] Supra, n. 318.

[321] U.N. Doc.A/CONF.13/42, p. 10, (1958).

[322] Ibid., at 21.

[323] Ibid., at 98.

> boundary of the continental shelf appertaining to such states shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each state is measured.
>
> 2. Where the same continental shelf is adjacent to the territories of two adjacent states, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each state is measured.[324]

Before proceeding to the examination of this Article it may be expedient to refer to the meaning of the "median line" and the "principle of equidistance" mentioned in paragraphs 1 and 2 of this Article respectively.

The "median line" is employed to delimit the boundary of the continental shelf between states whose coasts are opposite to each other,[325] while the "principle of equidistance" applies in cases of continental shelf delimitation between directly adjacent states having a lateral boundary.[326]

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[324] Supra, n. 319.

[325] Such is the case of the delimitation of the continental shelf between Canada and Greenland. See Agreement between Canada and Denmark on the Delimitation of the Continental Shelf between Greenland and Canada, done in Ottawa, on December 17, 1973, and entered into force on March 13, 1974. See, 13 International Legal Materials 506, (1974). Both Canada and Denmark are parties to the Geneva Convention on the Continental Shelf.

Both these methods are based on the "equidistance line",[327] i.e. the line which leaves to each of the states concerned all those portions of the continental shelf that are nearer to a point on its own baseline from which the width of its territorial sea is measured, than they are to any point on the baseline of any other state.[328] In the case of lateral delimitation the equidistance line is usually called "lateral line". In geometric terms the median line runs roughly in the middle of the submarine areas which it delimits, while the lateral line appears rather like a line perpendicular to the general direction of the coasts of the states concerned.

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[326] Such was the delimitation of the continental shelf in the North Sea, between the Federal Republic of Germany on the one side, and the Netherlands and Denmark on the other, which was disposed of by the International Court of Justice in the North Sea Continental Shelf Cases, ((1969) I.C.J. Rep. 3). See also the treaties on delimitation concluded in pursuance to the decision of the Court between Denmark and the Federal Republic of Germany, and between the Netherlands and the Federal Republic of Germany, in (1970-1971) I.C.J. Yearbook, pp. 118-126.

[327] Cf. Article 12 of the Geneva Convention on the Territorial Sea and the Contiguous Zone, which employs the term "median line" in a wider sense, comprising both the lateral and median lines. It reads:

> Where the coasts of two states are opposite or adjacent to each other, neither of the two states is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two states is measured. (516 U.N.T.S. 205).

[328] See E. Brown, The Legal Regime of Hydrospace, pp. 71-73, (1971). See also the North Sea Continental Shelf Cases, (1969) I.C.J. Rep. 3, at 17.

As it was noted above[329] the equidistance line was originally recommended for the delimitation of territorial waters. While in the case of territorial sea delimitation the equidistance line leads usually to equitable results, since it applies to a narrow belt of sea, its application for the lateral delimitation of the continental shelf where large expanses of submarine areas stretching in great distances from the coast are the object of delimitation, does not always lead to equitable solutions. The application of this method in cases where the coast of one of the states concerned is concave, would result in bending the line of the boundary towards the direction of the recessing coast, thus inequitably reducing the area of the continental shelf that would normally be alloted to that state if its coast was straight.[330]

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[329] Supra, pp. 145-146. In the commentary of the International Law Commission to Article 72 of its last Draft of Articles on the Law of the Sea, prepared in 1956, which is identical to Article 6 of the Convention on the Continental Shelf, it was noted that for the delimitation of the continental shelf the same principles were adopted as for Articles 12 and 14 of the same Draft, concerning the delimitation of the territorial sea. (Doc.A/3159, in (1956) I.L.C. Yearbook 300).

[330] An example of a concave coast is the coast of the Federal Republic of Germany in the North Sea, which is situated between the relatively convex coast of the Nethernands and the seaward protruding coast of Denmark. (Continued on next page.)

In contrast to the lateral line, the application of the median equidistance line in the delimitation of the continental shelf between opposite states effectuates in most cases an equitable apportionment, provided that no islands lie between the opposite coasts and no exceptional irregularities in the geographical configuration of the coasts exist. For the median line divides equally between the two opposite states the continental shelf which forms the submerged extension of their territories.

In its judgment in the North Sea Continental Shelf, where the issue was a lateral delimitation of the continental shelf, the International Court of Justice noted in an *obiter dictum* that the median equidistance line effects an equal division of the continental shelf. It also recognized and confirmed the double and distinct concept of delimitation concerning states with opposite coasts on the one hand, and adjacent states having a lateral boundary and abutting

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(continued from page 152.)

The application of the lateral equidistance line for the delimitation of the continental shelf among these states would considerably curtail the share of the Federal Republic of Germany, since the two lateral lines drawn from the points where Germany's concave coast joins the coasts of Denmark and the Netherlands would converge and meet at a small distance from the coast of Germany. (See the North Sea Continental Shelf Cases, (1969) I.C.J. Rep. 3, at 17,and the map, ibid., at p. 16). As it was noted by the Court in the same case,

> (t)he slightest irregularity in a coastline is automatically magnified by the (lateral) equidistance line as regards the consequences for the delimitation of the continental shelf...the greater the irregularity and the further from the coastline the area to be delimited, the more unreasonable are the results produced. (1969) I.C.J. Rep. 3, at 49.

on the same continental shelf, on the other, as contained in Article 6(1, 2) of the Geneva Convention on the Continental Shelf.[331]

Paragraphs 1 and 2 of the Convention provide that the first step in determining the boundary of the continental shelf between neighbouring states should be agreement between the states concerned. It is further provided that in the absence of agreement and unless special circumstances exist justifying another boundary, the boundary shall be determined by application of the equidistance principle.

(1) Delimitation by Agreement.

The provision of Article 6 of the Convention relating to agreement indicates in the first place that the equidistance principle is not *jus cogens* and, therefore, the states concerned are free to decide what criteria they should adopt for the delimitation of their common continental shelf. It would also appear from the wording of this provision that the Convention lays special emphasis on agreement as a way of delimiting the continental shelf.

This provision, however, is no more than a *pactum de contrahendo* which, although it imposes an obligation upon the parties to initiate negotiations aiming at an agreement, it does not imply that the parties are obliged to reach an agreement.[332] Without an accompanying provision for compulsory arbitration this provision seems to be equivalent to an entreaty that states agree to resolution of delimitation disputes. It might as well be said that the provision on agreement is superfluous, since even in its absence the states concerned could always have recourse to agreement and delimit their common continental shelf as suits them best. Its inclusion in Article 6 of the Convention, however, is not without significance. For it stresses the duty of the states concerned to initiate meaningful and constructive negotiations aiming at a delimitation agreement and carry them out in good faith. As it was noted by the International Court of Justice in its decision in the North Sea Continental Shelf Cases

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[331] (1969) I.C.J. Rep. 3, at pp. 36-38.

> ...the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it;[333]

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[332] As it was pointed out by the Permanent Court of International Justice in its advisory opinion on the Railway Traffic between Lithuania and Poland the "obligation to negotiate does not imply an obligation to reach an agreement." (P.C.I.J., Series A/B 42, p. 116, (1931)).

[333] (1969) I.C.J. Rep. 3, at 47.

(2) The "Special Circumstances" Proviso.

Article 6 of the Convention provides for an exception to the application of the equidistance principle in cases of "special circumstances". The Convention, however, does not indicate what these special circumstances may be and does not provide any alternative guiding principles for their identification.

A clue for the interpretation of this proviso could be derived from the words "special" and "justify" which seem to imply that the exception should be invoked only if the area in question has such a higher degree of unusual geographical configuration that one of the states concerned would suffer great injustice if the principle of equidistance were applied. It should be born in mind, however, that there are not two identical coastlines on the globe and therefore it is difficult to establish what is the rule and what is the exception in that matter. At any rate, features causing a coastline to be only slightly different from a relatively straight one would not warrant invocation of the special circumstances proviso.

In its decision in the North Sea Continental Shelf Cases the International Court of Justice pointed to "the part played by the notion of special circumstances relative to the principle of equidistance...and the very considerable, still unresolved controversies as to the exact meaning and scope of this notion."[334] But since the Court did not have to apply the proviso of special circumstances in this case, it did not purport to determine the exact degree of flexibility which the proviso brings to the principle of equidistance.

At the 1953 session of the International Law Commission, when the concept of special circumstances was first introduced, Lauterpacht objected to the inclusion of this proviso in Article 7 of the Draft Articles on the continental shelf[335] and urged the Commission to formulate specific exceptions rather than adopt a vague clause.[336] He further noted that "to state generally that arbitrators should take exceptions into consideration was tantamount to giving them the power to judge ex aequo et bono, which the Commission did not intend to do."[337] However, the Commission eventually retained the concept of special circumstances.

In its commentary to Article 7 of its second Draft of Articles on the continental shelf, prepared in 1953, the International Law Commission referred to some essential features which it considered as constituting special circumstances justifying a departure from the equidistance rule. Besides mentioning the cases of coastlines having an exceptional configuration it referred to the presence of "islands or of navigable channels" and noted that to that extent the equidistance principle partakes of some elasticity.[338] It appears that these particular features were not meant to be exhaustive of the notion "special circumstances" but were rather referred to indicatively.

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[334] Ibid., at 42.

[335] Supra, n. 317.

[336] (1953) I.L.C. Yearbook 131, par. 10, (vol. I).

[337] Ibid., par. 17.

As regards the delimitation of the continental shelf within navigable channels it may be noted that this feature can be hardly considered as constituting a special circumstance warranting a deviation from the equidistance principle of Article 6 of the Convention. For navigable channels are relatively narrow and the narrower the area to be delimited the more appropriate is the application of the equidistance line, since in such cases it leads to equitable solutions.

Of more practical importance is the question of the applicable law in the delimitation of the continental shelf between a coastal state and islands belonging to another state, and particularly the question whether the delimitation of the continental shelf in cases where islands are involved comes under the proviso of special circumstances of Article 6 of the Convention.

The Geneva Convention on the Territorial Sea and the Contiguous Zone states that "(a)n island is a naturally formed area of land, surrounded by water, which is above water at high tide."[339] Under the Convention on the Continental Shelf islands have their own continental shelf, since by Article 1(b) "submarine areas adjacent to the coasts of islands" are also included in the term "continental shelf" and appertain to the sovereign of the respective islands. While the point of departure in the delimitation of any continental shelf involving islands should be the aforesaid rule that islands have their own continental shelf, it is this fact that often complicates the process of delimitation between opposite and adjacent states.

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[338] (1953) I.L.C. Yearbook 216, par. 82, (vol. II).

It would appear from the aforementioned commentary of the International Law Commission to Article 7 of its 1953 Draft[340] that the presence of islands in a continental shelf area which is to be delimited by the state to which the island belongs and another state is considered as a basic case of special circumstances.[341] Although the applicable method of delimitation and the degree of deviation from the equidistance principle will depend on the relative location and size of islands with respect to other islands and the mailand states, it should be noted that if the equidistance method is strictly applied in cases where relatively small islands belonging to one state are close to the coast of another, the latter's share of the continental shelf will be considerably reduced.[342]

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[339] 516 U.N.T.S. 205, Article 10(1). The Informal Composite Negotiating Text, prepared by the Third United Nations Conference on the Law of the Sea during its Sixth Session, held in 1977, while it adopts the same definition of the island, it also provides that "(r)ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." (Doc. A/CONF.62/WP.10, p. 21, Article 121(3). It is worth noting in this context that as early as 1805 the Anna case appeared to provide authority for asserting that even the smallest and most unimportant islands are entitled to their own territorial sea. It was held in this case that a prize could not be taken by a British privateer within three miles of the mud islets at the Mouth of the Mississippi river which remained dry at high tide. (5 C. Rob. 373; 165 E.R. 809 (Admiralty), (1805)).

[340] Supra, n. 338.

At the Geneva Conference on the Law of the Sea of 1958, it was suggested by Commander Kennedy that "(f)or the purposes of drawing a boundary, islands should be treated on their merits, very small islands or sand banks being considered as having no continental shelf but only an appropriate territorial sea."[343]

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[341] Of the same view is J. A. C. Gutteridge, noting that "(o)ne clear example of 'special circumstances'...is the presence of islands". ("The 1958 Geneva Convention on the Continental Shelf", 35 Br. Y. Int. L. 102, at 120, (1959)). According to another view "(i)f all islands were included for purposes of measurement it might lead to extremely inequitable and implausible results in determining the boundary." (David J. Padwa, "Submarine Boundaries", 9 Int. Comp. L. Q. 628, at 647, (1960).

[342] In the decision of the Court of Arbitration, which was established by the United Kingdom and France to delimit the continental shelf in the English Channel, account was taken of some British islands off the coasts of France. The Court noted:

> The presence of these British islands close to the French coast, if they are given full effect in delimiting the continental shelf, will manifestly result in a substantial diminution of the area of continental shelf which would otherwise accrue to the French Republic. This fact by itself appears to the Court to be, prima facie, a circumstance creative of inequity and calling for a method of delimitation that in some measure redresses the inequity. (Par. 196 of the Judgment, excerpted in David A. Colson, "The United Kingdom-France Continental Shelf Arbitration", 72 Am. J. Int. L. 95, at 108, (1978)). The decision was handed down in 1977.

It may be noted that this criterion does not have any value as a general method. Besides the fact that it contravenes the basic rule of the Geneva Convention that islands have their own continental shelf, it does not take into consideration the relative location and size of islands with respect to the mainland state abutting on the same continental shelf. However, it might be useful for the individual case of delimitation if the states concerned consider it expedient to disregard islands in drawing the boundaries of their common continental shelf.[344]

The International Court of Justice referred, in an *obiter dictum* in its decision in the *North Sea Continental Shelf Cases*, to the question whether islands constitute "special circumstances" for the purpose of continental shelf delimitation. The Court noted that in the delimitation of a continental shelf between opposite states, it is appropriate to ignore the "presence of islets, rocks and minor coastal projections, the disproportionately distorting effect of which can be eliminated by other means."[345] While this statement appears to restrict the application of the special circumstances proviso of Article 6 of the Convention, it may be also interpreted as sanctioning the application of this proviso when islands, other than rocks, or minor coastal projections, are involved, (argumentum a contrario).

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[343] U.N. Doc.A/CONF.13/42, at p. 92, par. 3, (1958).

[344] See, e.g., the Saudi Arabia - Iran Agreement of October 24, 1968, regarding the delimitation of their continental shelves in the Persian Gulf. The two southerly sections of the boundary line were settled essentially on the principle of equidistance, which was adjusted to take into account the territorial sea but not the continental shelf of the two mid-Gulf islands, the one of which belongs to Saudi Arabia and the other to Iran. (The Agreement, together with a map, appears in 8 Int. Legal Materials 493, (1969)).

It would further appear that in order to achieve equitable solutions in cases of continental shelf delimitation involving islands, the equidistance principle should yield in favour of the special circumstances proviso.[346] A basic factor to be taken into account in such cases is the relative size of the islands with respect to the mainland state bordering on the same continental shelf, and particularly the relative length of the islands' coastlines compared with that of the mainland state. As it was stated by the International Court of Justice in its decision in the North Sea Continental Shelf Cases a delimitation should bring about a reasonable degree of proportionality between the extent of the continental shelf appertaining to the states concerned and the length of their respective coastlines.[347]

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[345] (1969) I.C.J. Rep. 3, at 36.

[346] Gutteridge notes that the varying circumstances regarding the delimitation of the continental shelf involving islands "not only show the difficulty of a uniform application of the median line principle, but also explain why the 1958 Geneva Conference found itself unable (as did the International Law Commission in its draft Articles) to include in the Convention any specific provisions about the effect of the presence of islands on the delimitation of the boundaries of the continental shelf. (Gutteridge, supra, n. 341, at p. 120).

Another important factor that should be considered is the existence of any historic rights which the islands' inhabitants may have acquired on the seabed beyond the limits of their territorial sea, as well as the importance of the continental shelf for the economy of the islands.

An appropriate solution in cases where islands intersperse between two mainland states would be the creation of zones of joint jurisdiction on the common continental shelf. This was in fact one of the solutions to the problem of overlapping continental shelves offered by the International Court in the North Sea Continental Shelf Cases.[348]

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[347] (1969) I.C.J. Rep. 3, at 52.

[348] Ibid., at 53. See also the Agreement between Saudi Arabia and Sudan, of May 16, 1974, regarding the joint exploitation of the natural resources of the seabed and subsoil of the Red Sea in their common zone. (United Nations Legislative Series: National Legislation and Treaties Relating to the Law of the Sea, U.N. Doc./ST./LEG./SER.B/18, p. 439, (New York, 1975)).

The aforementioned examples of special circumstances referred to by the International Law Commission in its commentary to Article 7 of its 1953 Draft of Articles on the continental shelf[349] reflect the extremely complex geographical features which are involved in the delimitation of the continental shelf and in a way explain why the considerably wide proviso of "special circumstances" was embodied in Article 6 of the Convention on the Continental Shelf. It would appear that this proviso's ratio legis is to ensure that the unique factors in the individual case of delimitation are taken into account, so that equitable solutions can be reached.

The International Court of Justice noted in its decision in the North Sea Continental Shelf Cases that the exception in favour of special circumstances was introduced in pursuance of the belief that the determination of the boundaries of the continental shelf should be effected on equitable principles.[350] In the same decision the Court deemphasised the importance of the equidistance principle as a method of delimitation, in favour of delimitation according to equitable principles.[351]

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[349] Supra, n. 338.

[350] (1969) I.C.J. Rep. 3, at 36. See also Separate Opinion of Judge Padilla Nervo, ibid., 85, at 93.

[351] Ibid., at 53. It should be noted, however, that Article 6 of the Convention on the Continental Shelf was (continued on next page.)

This primacy of equitable principles could be viewed as revitalizing the special circumstances proviso of Article 6 of the Convention, in the sense that the conventional rule of special circumstances which calls for delimitation on equitable principles is identified with the extra-conventional norm, which was declared by the International Court, namely that delimitation "is to be effected by agreement in accordance with equitable principles".[352]

It would further appear that in so far as the equidistance rule of Article 6 of the Convention yields in favour of the special circumstances proviso in cases of delimitation between states-parties to the Geneva Convention, the applicable law is identical with the law which applies in the delimitation of the continental shelf between states not parties to the Convention (or where at least one of the states concerned is not a party to the Convention). Given the fact that in most delimitation cases special circumstances exist to a lesser or greater degree, it is apparent that to a great extent the applicable law is uniform since the difference between the conventional and non-conventional law on the subject is minimized.

(continued from page 164.)
not applicable in this case, since the Convention was not binding upon the Federal Republic of Germany which was not a party to it. The Court referred to the extra-conventional status of the equidistance rule and found that it is not a rule of customary international law. (Ibid., p. 41, par. 69 and p. 45, par. 81).

[352] Ibid., p. 53, par. 101.

Two matters relevant to the application of the special circumstances proviso of Article 6 of the Convention merit further attention. The first is the question whether the state claiming that special circumstances exist in a certain continental shelf has the burden of proof of its contentions and the second is the exact meaning of the notion "equitable principles".

As regards the question of the onus probandi it may be noted in the first place that it is not a question of one state proving to the other the existence of special circumstances, for in such case success or failure of proving special circumstances cannot but depend upon whether or not the mutual consent of the states concerned is obtained. It is rather a question directly linked with the judicial settlement of delimitation disputes,[353] in the sense that the tribunal to which a delimitation dispute is submitted is the only appropriate forum before which the evidence of the existence of special circumstances is to be produced, if the question of the existence of the onus probandi is to be answered in the affirmative.

It appears, however, that the special circumstances proviso is part of the rule of Article 6 of the Convention, which provides for delimitation on an equidistance special - circumstances basis and, consequently, the tribunal to which a delimitation dispute is submitted will apply this combined rule, taking into consideration all the relevant geographical features of a certain continental shelf, without requiring any proof of the existence of special circumstances. As it was noted by the International Law Commission in its commentary to Article 7 of its 1953 Draft of Articles on the continental shelf, the principle of equidistance "partakes of some elasticity" and the tribunal, in deciding a delimitation case, should take into account any special circumstances.[354]

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[353] The term "judicial" is employed here in a wider sense, comprising international arbitration and the International Court of Justice.

In the recent decision of the Court of Arbitration which was established by the United Kingdom and France to delimit the continental shelf in the English Channel, it was found that there is no burden of proof in regard to the existence of special circumstances, since "the question of whether 'another boundary is justified by special circumstances' is an integral part of the rule providing for the application of the equidistance principle."[355]

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[354] (1953) I.L.C. Yearbook 216, par. 82.

[355] Par. 68 of the Judgment, excerpted in David A. Colson, supra, n. 342, at p. 103.
McDougal and Burke take the opposite view, noting:

> ...a state claiming to depart from use of the median line should be regarded as having the burden of explaining the precise conditions which compose the special circumstances allegedly justifying such deviation. (McDougal and Burke, supra, n. 269, at p. 437).

With respect to the notion "equitable principles" which is identical with equity and forms the underlying philosophy of the special circumstances proviso of Article 6 of the Convention, it should be noted that while its function is to temper the application of Article 6 and prevent extreme injustice in particular cases, it should not lead to complete reapportionment of the continental shelf. As it was noted by the International Court of Justice in its decision in the North Sea Continental Shelf Cases, the process of delimitation is one of drawing the boundary between areas which already belong to the states concerned, as forming the natural prolongation of their land territories towards and under the sea.[356] The Court further observed:

> Evidently any dispute about boundaries must involve that there is a disputed marginal or fringe area, to which both parties are laying claim, so that any delimitation of it which does not leave it wholly to one of the parties will in practice divide it between them in certain shares, or operate as if such a division had been made. But this does not mean that there has been an apportionment of something that previously consisted of an integral, still less an undivided whole.[357]

Referring to the application of equity in the delimitation of the continental shelf, the Court noted:

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[356] (1969) I.C.J. Rep. 3, at 22.

[357] Ibid., at pp. 22-23.

> Equity does not necessarily imply equality. There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be alloted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline. Equality is to be reckoned within the same plane, and it is not such natural inequalities as these that equity could remedy...It is therefore not a question of totally refashioning geography whatever the facts of the situation but, given a geographical situation of quasi-equality as between a number of States, of abating the effects of an incidental special feature from which un unjustifiable difference of treatment could result.[358]

3. The Defects of the Geneva Convention on the Continental Shelf with respect to Delimitation.

The failure of the Convention on the Continental Shelf to provide for compulsory settlement of disputes by third party decision affects all its provisions but most vitally the Article on delimitation. For in the absence of agreement on delimitation, the only solution possible is to submit the dispute to arbitration or to the International Court of Justice, a solution which would require a special agreement under the Convention regime. While it might be said that coastal states would have a strong interest to submit their delimitation disputes to arbitration in order to settle a definite boundary before they proceed to exploit their portion of continental shelf, it is nevertheless possible that the stronger state might prefer to avoid arbitration if it could gain more through exerting pressure on the weaker.

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[358] Ibid., pp. 49-50, par. 91.

Furthermore, in view of the wide construction of the special circumstances proviso of Article 6, a third party decision would be indispensable in order to interpret it and adapt it to the particularities of the individual case.

That the International Law Commission had laid special emphasis on arbitration as the most appropriate means of resolving delimitation disputes is evident from the Commission's Article 7 of its first Draft of Articles on the continental shelf, prepared in 1951, which provided that failing agreement "the parties are under an obligation to have the boundaries fixed by arbitration."[359] It is noteworthy that this draft Article did not contain any guiding principles in regard to delimitation and, as it was noted in the respective commentary of the Commission, the arbitration was contemplated as one ex aequo et bono.[360]

The Commission's second Draft of Articles on the continental shelf, prepared in 1953, contained a general arbitration clause providing that any disputes which might arise between states concerning the interpretation or application of these Articles should, upon the request of any of the parties, be submitted to arbitration.[361] In its last Draft of Articles on the continental shelf,[362] prepared in 1956, the Commission included a provision stating that any disputes concerning the interpretation and application of these Articles "should be submitted to the International Court of Justice at the request of any of the parties, unless they agree on another method of peaceful settlement."[363] The Commission replaced arbitration by reference to the International Court of Justice because it thought that arbitration would not be of much practical value, unless the procedures to be followed were laid down at the same time. It also felt that disputes of this nature would not be of a very technical character to require settlement by a special arbitral tribunal.[364] This provision was adopted by Committee IV of the Geneva Conference on the Law of the Sea of 1958, but it was rejected at the plenary session, having failed to secure the two-thirds majority necessary for passage.[365]

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[359] (1951) I.L.C. Yearbook 143, (vol. II).

[360] Ibid.

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[361] (1953) I.L.C. Yearbook 213, Article 8, (vol. II).

[362] (1956) I.L.C. Yearbook 295.

[363] Ibid., at p. 300, Article 73.

[364] Ibid., Commentary to Article 73, par. 3.

[365] U.N. Doc.A/CONF.13/SR.17, p. 12.

It is unfortunate that the Geneva Conference on the Law of the Sea of 1958 failed to embody in the Geneva Convention on the Continental Shelf the clause on compulsory settlement of disputes, which was an essential part of the continental shelf regime envisioned by the International Law Commission.

With respect to delimitation it may be noted that without an impartial third party decision the advantages of the combined equidistance - special circumstances rule of Article 6 of the Convention, namely its flexibility and adaptability to the geomorphological features of the individual case, remain unutilized and the achievent of this rule's ultimate goal of effectuating a delimitation on equitable principles hinges upon agreement between the states concerned to submit their delimitation disputes to arbitral or judicial settlement. The conclusion of such agreement will depend on the willingness of states to direct their delimitation disputes to settlement through arbitral or judicial channels where the principle of equality before the law prevails, as opposed to other channels in which economic, political and other pressures play dominant roles.[366]

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[366] It would appear that the Convention adopts the view that "it is the essence of international law that a State can legally claim the right to remain judge in disputes with other States by the simple means of refusing to them the benefit of judicial settlement." (2 International Law, Being Collected Papers of Hersh Lauterpacht, pp. 18-19, (E. Lauterpacht ed., 1975)).

It should be noted that those states which have ratified the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes[367] or have accepted as compulsory the jurisdiction of the International Court of Justice under Article 36(2) of its Statute[368] can resort to the International Court of Justice for the settlement of their delimitation disputes. The Optional Protocol was adopted by the Geneva Conference on the Law of the Sea of 1958 and applies to any disputes arising from the interpretation or application of all four Conventions on

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[367] U.N. Doc.A/CONF.13/L.57; 450 U.N.T.S. 169.

[368] Article 36(2) of the Statute of the International Court of Justice reads:

> The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
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> a. the interpretation of a treaty;
> b. any question of international law;
> c. the existence of any fact which, if established, would constitute a breach of an international obligation;
> d. the nature or extent of the reparation to be made for the breach of an international obligation;

the law of the sea adopted by the Conference,[369] except for disputes relating to certain Articles of the Convention on Fishing and Conservation of the Living Resources of the High Seas as to which this Convention contains its own specific procedures.[370] As of December 31, 1977, this Protocol had been ratified by only thirty-five states.[371]

4. The Law on Delimitation Applicable to States not Parties to the Convention on the Continental Shelf.

The question of the applicable law in the delimitation of the continental shelf in cases where at least one of the states concerned is not a party to the Geneva Convention on the Continental Shelf is of considerable practical importance, owing to the fact that roughly only one-third of the total number of states have todate ratified the Convention.[372]

A case of delimitation where the Convention did not apply was the one disposed of by the International Court of Justice in its decision in the North Sea Continental Shelf Cases. The issue before the Court involved the delimitation of the continental shelf in the North Sea between Denmark and the Netherlands on the one hand and the Federal Republic of Germany on the other. Germany had not ratified the Convention and therefore the rules on delimitation of Article 6 of this Convention did not apply.

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[369] Supra n. 245.

[370] Supra n. 248.

[371] Supra n. 302, at 543.

[372] Supra n. 302.

A bilateral agreement between Germany and the Netherlands, signed in 1964, had delimited the continental shelf between the two countries only in the immediate vicinity of the coastline[373] and a similar one was signed between Germany and Denmark in 1965.[374] Agreement could not be reached as to the boundaries in the undelimited area and the disputes were submitted to the International Court of Justice on February 20, 1967.[375] Germany concluded with each of its opponents a special agreement, Article 1 of which requested the Court to decide:

> What principles and rules of international law are applicable to the delimitation as between the parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary...[376]

The Court found that the equidistance principle did not apply "as legally necessary, in the sense of being an inescapable a priori accompaniment of the basic continental shelf doctrine".[377] It also found that the rule of Article

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[373] 550 U.N.T.S. 123.

[374] 570 U.N.T.S. 91.

[375] (1969) I.C.J. Rep. 3, at pp. 5-7.

[376] Ibid., at p. 6.

[377] Ibid., at p. 32, par. 46. See also ibid., p. 36, par. 56.

6 of the Convention, which provides that delimitation should be effected on an equidistance - special circumstances basis in the absence of agreement, was not a customary rule of international law, since such rule was neither pre-existing or emergent at the time of the signing of the Convention, nor did it receive the status of a customary rule afterwards.[378]

The Court further noted that two concepts, "of delimitation by mutual agreement and delimitation in accordance with equitable principles, have underlain all the subsequent history of the subject."[379] The Court expanded on these concepts by pointing out that "no one single method of delimitation was likely to prove satisfactory in all circumstances, and that delimitation should, therefore, be carried out by agreement (or by reference to arbitration); and secondly that it should be effected on equitable principles."[380]

In the Court's opinion, the duty to enter into negotiations with a view to arriving at an agreement arises out of the customary rules relating to the continental shelf and

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[378] Ibid., p. 41, par. 69, and p. 45, par. 81.

[379] Ibid., p. 33.

[380] Ibid., p. 36.

> ...merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes.[381]

As to the particular method to be employed in a delimitation, the Court noted that international law permits a combined application of various methods and principles provided that a reasonable result is arrived at.[382] It further noted that delimitation is to be effected

> in such a way as to leave as mush as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other.[383]

Finally the Court enumerated a number of factors which should be taken into account in the delimitation of the continental shelf in order to reach equitable results, such as coastal configuration and presence of any special or unusual features, physical and geological structure of the shelf area and the element of a reasonable degree of proportionality between the shelf area and the length of the coastline of each state.[384]

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[381] Ibid., at 47.

[382] Ibid., at 49.

[383] Ibid., at 53.

[384] Ibid., at 54.

The Court's opinion centred upon two ideas. The first is that the boundary lines have to be drawn by agreement or arbitration in accordance with equitable principles and the second is that the determination of these boundaries must result in attributing to each state the submarine areas which constitute the natural prolongation of its land territory.

It may be noted that these principles are not only consistent with the history and the ratio legis of the continental shelf doctrine, but they can also be reconciled with the rules of Article 6 of the Convention, inasmuch as the aim of the wide proviso of special circumstances of this Article, as the Court also noted,[385] is to effect delimitation on equitable principles. It should be also born in mind that although the Court found that the equidistance rule of Article 6 of the Convention is not a customary rule, it nonetheless noted that the equidistance principle can be employed as long as it leads to equitable solutions.[386]

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[385] Supra, n. 350.

In his dissenting opinion Judge Koretsky noted that the special circumstances proviso functions as a corrective clause to the equidistance principle and pointed to the intimate interconnection of the three elements of Article 6 of the Convention, namely agreement, equidistance and special circumstances, in forming a normal procedure for the delimitation of the boundary line of the continental shelf. ((1969) I.C.J. Rep. 3, at 163).

[386] (1969) I.C.J. Rep. 3, at 47.

In its award on the delimitation of the continental shelf between France and the United Kingdom in the English Channel[387] the Court of Arbitration went even further in holding that the principles on delimitation drawn by the International Court of Justice in the North Sea Continental Shelf Cases and the rules of Article 6 of the Convention are essentially the same.[388] The Court further noted:

> ...the equidistance-special circumstances rule and the rules of customary law have the same object - the delimitation of the boundary in accordance with equitable principles...the rules of customary law are relevant and even essential means both for interpreting and completing the terms of Article 6...[389]
> The choice of the method or methods of delimitation in any given case, whether under the 1958 Convention or customary law, has...to be determined in the light of...the (geographical and other relevant) circumstances and of the fundamental norm that the delimitation must be in accordance with equitable principles.[390]

It appears that both conventional and customary law concerning the delimitation of the continental shelf centre upon the concept that delimitation should be effected by agreement in accordance with equitable principles.[391]

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[387] Supra, n. 342.

[388] Ibid., par. 96. Of the same view is Professor Rigaldies, noting that "(l)e droit général applicable en l'espèce est conforme aux termes de l'article 6 de la Convention de Genève de 1958 sur le plateau continental". (Francis Rigaldies, "La delimitation du plateau continental entre états voisins", 14 Canadian Y. Int. L. 116, at 155, (1976).

[389] Ibid., par. 75.

[390] Ibid., par. 95.

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[391] Agreements on delimitation concluded between states - parties to the Geneva Convention on the Continental Shelf, as well as between states not parties to this Convention (or between a state - party and a state not party to the Convention) take into account the special geomorphological features of the individual case in drawing the boundary of the continental shelf. Where the equidistance line leads to equitable solutions, it is employed with minor modifications.

Delimitation agreements between states - parties to the Convention are, e.g., the Agreement between Canada and Denmark on the delimitation of the continental shelf between Greenland and Canada, of December 17, 1973, (supra, n. 325), where the principle of equidistance was applied with some adjustments to the geographical situation, in order to establish a mutually acceptable and equitable boundary. Similar are the agreements between Poland and the U.S.S.R. on the delimitation of the continental shelf in the Gulf of Gdansk and in the southest part of the Baltic Sea, of August 28, 1969, (9 Int. Legal Materials 697, (1970)), between Finland and Sweden, on the delimitation of the continental shelf in the Gulf of Bothnia, the Aland Sea and the northermost part of the Baltic Sea, of September 29, 1972, (United Nations Legislative Series, National Legislation and Treaties Relating to the Law of the Sea, U.N. Doc.ST./LEG./SER.B/18, p. 439, (New York, 1975)), and between France and Spain, on the delimitation of the continental shelf in the Gulf of Gascogne, of January 29, 1974, ((1975) Revue General de Droit International Public, pp. 190-191).

Delimitation agreements between states, at least one of which is not a party to the Convention, are, e.g., those concluded between the three coastal states bordering on the North Sea which were the litigants in the North Sea Continental Shelf Cases. These agreements presumably meet the criteria suggested by the International Court (supra, n. 384), and since they came out of negotiations and the parties accepted them, the new limits must have been perceived as equitable. (See the treaties between the Federal Republic of Germany and Denmark, and between the Netherlands and the Federal Republic of Germany, of January 28, 1971, in (1970-1971) I.C.J. Yearbook pp. 118-122). Another agreement of this category is the Treaty between Thailand, Indonesia and Malaysia, of December 21, 1971, concerning the delimitation of the continental shelf in the northern part of the Straits of Malacca. The boundaries in this case were drawn according to the equidistance principle, with minor modifications. Account was not taken of the intervening small islands. (U.N. Leg. Series, U.N. Doc. ST./LEG./Ser.B/18, p. 429).

Although agreement is the most appropriate means to delimit the continental shelf, since the parties are free to adjust the boundary line according to their special needs and the individual features of the situation, it will often be difficult for states to agree on the particular circumstances in any given case. Thus, resort to judicial or arbitral settlement would appear to be necessary. This would again require agreement, since there is no obligation under customary law to submit delimitation disputes to third party decision.[392]

It may be noted that both the International Court of Justice, in its decision in the North Sea Continental Shelf Cases, and the Court of Arbitration, in its award on the delimitation of the continental shelf in the English Channel, insisted in drawing general principles for the delimitation of the continental shelf, rather than recommending any specific methods applicable to any delimitation case.[393]

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[392] The International Court of Justice mentioned reference to arbitration as a means of resolving delimitation disputes but it did not imply that there is an obligation under customary law to have recourse to arbitration in the absence of agreement. (Supra, n. 380).

[393] See supra, nn. 381, 390.

In his dissenting opinion in the North Sea Continental Shelf Cases Judge Tanaka noted that the decision of the Court did not provide

> ...any indication as to what are the "principles and rules of international law", namely juridical principles and rules vested with obligatory power rather than considerations of expediency - factors and criteria - which are not incorporated in the legal norm and about which the Parties did not request an answer. ((1969) I.C.J. Rep. 3, at 196).

This approach seems justified, in view of the considerable complexity of the matter. The geographical and geological factors vary so greatly from one case to another, that one single general principle could hardly take all the possible circumstances into account and always lead to satisfactory results. In this respect both these decisions, as well as the combined equidistance-special circumstances rule of Article 6 of the Convention on the Continental Shelf, have struck a balance between the element of certainty[394] of the law and the element of flexibility, in the sense that the law on the subject is clear enough to provide guidance for a delimitation through third party decision or through agreement, and flexible enough to respond to the needs of the individual case. It should be noted in this respect that in view of the lack of compulsory settlement of delimitation disputes the element of certainty of the law plays a significant role in encouraging states to submit their delimitation disputes to arbitration or to the International Court of Justice.

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[394] Although the basic substantive law stricto sensu on the subject comprises only the general norm that delimitation should be effected on equitable principles, this norm should be interpreted in the light of the meaning attributed to it in the North Sea Continental Shelf Cases (supra n. 358). The applicable law is further clarified by the general guidelines drawn by the International Court in the same case and particularly by the enumerated factors which ought to be tken into consideration in drawing the boundary of the continental shelf, ((1969) I.C.J. Rep. 3, at 54. See also supra, n. 384).

It should be also noted that every delimitation is subject to the paramount principle of the natural prolongation, in the sense that all submarine areas which constitute the natural prolongation of a state's land territory appertain to it ipso jure and should, therefore, be included in the part of continental shelf to be alloted to that state. ((1969) I.C.J. Rep. 3, at 22).

5. The Third United Nations Conference on the Law of the Sea.

In conformity with the view taken by the International Court of Justice in its decision in the North Sea Continental Shelf Cases,[395] the Third United Nations Conference on the Law of the Sea adopted "equitable principles" as the standard for delimitation of the continental shelf between opposite and adjacent states. It should be noted that many states participating in the Conference face the problem of delimitation of their own continental shelf and some have active boundary disputes. The effect of the Judgment of the International Court is also reflected in the formal proposals submitted to the Conference by certain states.[396]

Article 83(1) of the Informal Composite Negotiating Text reads:

> The delimitation of the continental shelf between adjacent or opposite States shall be

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[395] Supra, n. 380.

[396] See, e.g., the joint proposal of Kenya and Tunisia and the separate proposal of France, both of which include draft Articles on the delimitation of the continental shelf, in U.N. Doc.A/CONF.62/C.2/L.28, and U.N. Doc.A/CONF.62/C.2/L.74, respectively. Similar is the Irish proposal, U.N. Doc.A/CONF.62/C.2/L.43.

> effected by agreement in accordance with equitable principles, employing, where appropriate,the median of equidistance line, and taking account of all the relevant circumstances.[397]

Paragraph 2 of the same Article provides that if no agreement can be reached within a reasonable period of time the states concerned shall resort to the procedures for the settlement of disputes provided for in Part XV of the Text.[398] This Part provides, in the first place, that the states concerned have the choice to resort to conciliation, according to the procedure provided in Annex IV of the Text.[399] According to this procedure, the dispute is submitted to a "Conciliation Commission" whose task is confined in recording any agreements reached between the parties, or, failing agreement, in recording "its conclusions on all questions of fact or law relevant to the matter in dispute and such recommendations as the Commission may deem appropriate for an amicable settlement of the dispute."[400] These recommendations, however, are not binding upon the parties to the dispute.[401]

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[397] U.N. Doc.A/CONF.62/WP.10, supra, n. 280.

[398] Ibid., pp. 45-48, Articles 279-297.

[399] Ibid., pp. 57-58.

[400] Ibid., p. 57, Article 7(1) of Annex IV.

[401] Ibid., par. 2.

More important are the provisions of the Text relating to the compulsory settlement of delimitation disputes. Article 287 of the Text provides that states shall be free to choose, by means of a written declaration, one or more of the two judicial and two arbitral bodies, which are enumerated in the same Article, for the settlement of disputes arising out of the interpretation or application of any Article of the Text. The two judicial bodies referred to in this Article are the Law of the Sea Tribunal[402] and the International Court of Justice, and the two arbitral bodies are the arbitral tribunal[403] and the special arbitral tribunal.[404]

From a combined interpretation of paragraphs 3-5 of Article 287 of the Text the following conclusions may be drawn:

a. Disputes between states which have not accepted the same tribunal by written declaration under this Article, or at least one of them has not made such declaration, shall be submitted to the arbitral tribunal, constituted according to Annex VI of the Text, unless the parties otherwise agree.

b. Disputes between states which have accepted the same tribunal by written declaration under this Article, shall be entertained by the tribunal of their common choice, unless the parties otherwise agree.

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[402] Ibid., p. 58, (Annex V).

[403] Ibid., p. 61, (Annex VI).

[404] Ibid., p. 62, (Annex VII).

Article 297 of the Text further provides that any state may declare that it does not accept the jurisdiction of the above mentioned four tribunals, with respect to certain disputes mentioned in the same Article. Among them are "(d)isputes concerning sea boundary delimitations between adjacent or opposite states".[405] This optional exception in regard to delimitation disputes is subject to the provision that

> ...the State making such a declaration shall, when such dispute arises, indicate, and shall for the settlement of such disputes accept a regional or other third party procedure entailing a binding decision, to which all parties to the dispute have access",[406]

and further that

> such procedure or decision shall exclude the determination of any claim to sovereignty or other rights with respect to continental or insular land territory".[407]

The Text further provides that the decision of any tribunal having jurisdiction under the above mentioned provisions "shall be final and shall be complied with by all the parties to the dispute."[408]

The system of compulsory settlement of disputes envisioned in the Informal Composite Negotiating Text forms a necessary complement of the whole law of the sea and should be recommended *de lege ferenda*. Its basic character as *jus dispositivum* renders it flexible enough to allow states various modes of peaceful settlement, ranging from informal non-compulsory procedures to formal compulsory procedures entailing binding decisions. This system's central idea is that law of the sea disputes in general and delimitation disputes in particular, should be settled by peaceful means of the parties' own choice, including judicial or arbitral settlement of a compulsory nature, thereby precluding the use or threat of force.

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[405] Ibid., p.48, Article 297 (1) (a).

[406] Ibid.

[407] Ibid.

[408] Ibid., p. 47, Article 294.

CHAPTER VII

THE LEGAL REGIME OF THE SEABED BEYOND THE LIMITS OF NATIONAL JURISDICTION.

1. Present Law Insufficient.

If the geographical limits of national jurisdiction with respect to the continental shelf are not precisely defined in the Geneva Convention on the Continental Shelf, which adopts the 200-meter water depth contour line and the fluid criterion of exploitability for the delimitation of the seaward boundary of the continental shelf,[409] the law relating to the seabed beyong the limits of national jurisdiction is also ambiguous and uncertain.

Since the deep seabed areas are not under the authority of any state and in view of the growing possibilities for exploitation of the natural resources of the seabed and its subsoil in greater depths, the problem of establishing an order which will balance possible conflicts of interests becomes more urgent.

The theoretical views regarding the legal status of the seabed underlying the high seas are divided. Some commentators, including Colombos[410] and Gidel,[411] take the view that the seabed beyond national jurisdiction has the same status as the high seas and, therefore, being a res communis, is incapable of occupation. Others, including Fauchille,[412] Westlake[413] and H. A. Smith,[414] are of the opinion that the seabed is land underlying the high seas and, therefore, as nobody's property (res nullius), is capable of possession by the first occupier.

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[409] Supra, n. 248.

[410] Colombos, supra, n. 167.

[411] Gidel, supra, n. 9.

Colombos further notes that the subsoil underlying the high seas can be the object of occupation, provided that no obstacles are made to the freedom of navigation on the high seas. This writer, however, refers specifically to the exploitation of the subsoil under the high seas through mine shafts or tunnels which are sunk ashore and extend seaward.[415]

While neither of the two opposite view regarding the legal status of the seabed could serve as a model for the regulation of the exploitation of the seabed beyond the limits of national jurisdiction, it may be noted that the res communis theory in implying that the seabed is the property of all states and, therefore, it may not be exploited at will by any state, is in conformity with the philosophy which underlies the present trends within the United Nations towards the establishment of a legal regime for the deep seabed and whose central idea is that the seabed beyond national limits is the "common heritage of mankind".[416]

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[412] Fauchille, supra, n. 168, at p. 19.

[413] Westlake, supra, n. 168, at pp. 187-188.

[414] H. A. Smith, Great Britain and the Law of Nations, p. 122, (vol. II), (London, 1935).

[415] Colombos, supra, n. 167, at p. 64. Cf. Article 7 of the Geneva Convention on the Continental Shelf, providing that the coastal state has the right to exploit the subsoil under the high seas by means of tunnelling irrespective of water depth. (499 U.N.T.S. 311).

On the other hand, acceptance of the *res nullius* theory as a model for the regulation of the exploitation of the seabed would confer great advantages on the developed countries, which have the technological capability to engage in exploitation and exploration activities on the deep seabed and would also cause a perilous scramble between states for the acquisition of exclusive rights on the seabed, which would finally result in a *bellum omnium erga omnes*.

That this latter theory is not favoured by states is evident from the recent case of the American firm Deepsea Ventures, Inc., which in November 1974, filed with the Department of State of the United States a "Notice of Discovery and Claim of Exclusive Mining Rights, and Request for Diplomatic Protection and Protection of Investment".[417] The firm further announced that it planned to engage in exploration activities in an area of 60,000 square kilometers between Hawaii and Mexico underlying the high seas. The Department of State responded that it"does not grant or recognize exclusive mining rights to the mineral resources of an area of the seabed beyong the limits of national jurisdiction."[418] Shortly afterwards the Government of Canada addressed a letter to this company in which it stated that it rejects the assertion "that the firm has exclusive mining rights or some priority in time over that portion of the international seabed area as described in the notice to the Secretary of State, or that it has acquired any rights to that area of the resources thereof through its activities."[419] A letter on the same lines was addressed to the company by Australia in March 1975, and in January 1975 the British Embassy in the United States stated that the British Government did not recognize the claim.[420]

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[416] General Assembly Resolution 2749 (XXV), December, 17, 1970.

[417] 14 Int. Legal Materials, pp. 51-65, (1975).

It would appear then that the traditional law of the sea does not provide viable solutions in regard to the regulation of the deep seabed area and that the answers "given to the problems of navigation, or fishing, or even pearl-fishing or subsoil mining, do not dictate the answers that should apply to elaborate operations for digging for manganese nodules in the mid-ocean."[421]

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[418] Ibid., p. 66.

[419] Ibid., p. 67.

[420] Ibid., pp. 795-796.

2. The Resources of the Deep Seabed.

The economically significant resources of the deep seabed are exclusively mineral resources. The most important mineral deposits are the ferro-manganese minerals which occur on the seabed either in the form of crusts or as spherical nodules with diameters ranging from less than a centimeter to twenty centimeters, and are generally located at depths of 3,500 to 4,500 meters. These crusts and nodules contain valuable minerals such as manganese, iron, nickel, copper and cobalt.[422]

According to one observer, one per cent of the ocean floor could be expected to satisfy the world's needs for manganese, nickel and copper for about fifty years in terms of the demand in 1967.[423] According to another view, even if only one per cent of the nodules in the

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[421] L. Henkin, Law of the Sea's Mineral Resources, p. 29, (Columbia University, 1968).

[422] Report of the Secretary-General on the Mineral Resources of the Sea beyond the Continental Shelf, U.N. Doc.E/4449/Add.1, February 19, 1968, pp. 32-33.

[423] Frank LaQue, "Deep Ocean Mining: Prospects and Short Term Benefits", in Burnell and Van Simson, ed., Pacem in Maribus: Ocean Enterprises, p. 21, (Santa Barbara, California, Center for the Study of Democratic Institutions, 1970).

Pacific Ocean prove economic to mine "the reserves of many metals in the nodules will still be measured in terms of thousands of years at the present rates of world consumption".[424]

Equally optimistic were the observations of Ambassador Arvid Pardo of Malta in his speech tc the First Committee of the General Assembly, in November 1967.[425] It should be noted, however, that despite the existence of a sufficient amount of reports on the subject, there is still some uncertainty as to the exact amount of the manganese nodules in the deep seabed, their density and metal contents, the time when they may be mined profitably, and the possible economic impact of sea supplies on land based resources. It is believed by some observers that the ferro-manganese nodules may be profitably harvested at the present time.[426] The same conclusions may be drawn from the aforementioned Notice of Discovery and Claim of the Deepsea Ventures, Inc., in which it was noted that the exploitation might commence by 1979.[427]

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[424] John L. Mero, Mineral Resources of the Sea,p. 234 (New York, 1965).

[425] Meeting of November 1, 1967, U.N. Doc.A/C.1/PV.1515, p. 17.

[426] Mero, supra n. 424, pp. 252-272.

[427] Carl Q. Cristol, "An International Seabed Authority", in Don Walsh ed., The Law of the Sea, Issues in Ocean Resource Management, (New York, 1977), p. 172, at 180.

Other important resources of the deep seabed are phosphorites and surficial deposits of red clay. Phosphorites are usually found on the outer part of the continental margin and the landward edges of the deep ocean floor.[428] As regards oil resources it may be noted that there is a current of opinion that oil deposits are confined on the continental margins and the small ocean basins.[429]

The Informal Composite Negotiating Text, which contains draft Articles on the legal regime of the deep seabed, adopts in Article 133 a definition of the deep seabed resources. This definition comprises only non-living resources, unlike the definition of the resources of the continental shelf, embodied in the Geneva Convention on the Continental Shelf, which includes also the living resources of the seabed. The term "minerals" is employed in this definition in a very wide sense, comprising all liquid or gaseous substances, and virtually all minerals of the seabed and its subsoil.[430]

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[428] V. E. McKeley and Frank W. H. Wang, World Subsea Mineral Resources, pp. 10-11, (Washington D.C., 1969).

[429] Ibid., p. 8. See also the Report of the Ad Hoc Committee to Study the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction, U.N. Doc.A/7230, Annex I, p. 24, (1968).

According to a report of the National Petroleum Council, of July 9, 1968, significant deposits of oil under the deep oceans could be neither confirmed or ruled out as possibilities. (L. Juda, Ocean Space Rights, p. 97, Praeger Publishers, New York, 1975).

[430] Supra, n. 280, Part II, Article 133.

3. Early Developments towards the Establishment of a Legal Regime for the Seabed beyond the limits of National Jurisdiction.

As early as 1950, Albert de Lapradelle proposed before the French Branch of the International Law Association to entrust the organization, development and distribution of all resources of the submarine areas to the United Nations. At the Conference of the Association held in Copenhagen in 1950, this view was also supported by some other members.[431]

The idea for the exploitation of the seabed resources by an international agency was rejected by the International Law Commission, when a similar proposal was advanced in regard to the exploitation of the continental shelf during the Commissions early deliberations on the subject. The Commission was of opinion that such "internationalization would meet with insurmountable practical difficulties, and it would not ensure the effective exploitation of the natural resources which is necessary to meet the needs of mankind."[432]

In his 1956 Report on the Regime of the High Seas and the Regime of the Territorial Sea the Rapporteur of the International Law Commission noted that the problem of the exploitation of the seabed beyond the outer limits of the continental shelf was not examined by the Commission and concluded that the regulation of seabed exploitation beyond a 200-meter water depth "is at present impossible, and is likely to remain so for some considerable time."[433]

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[431] International Law Association, Report on the Forty-Fourth Conference, pp. 91-103, (Copenhagen, 1950).

[432] U.N. Doc.A/1858, in (1951) I.L.C. Yearbook 141, at 142.

Several proposals in favour of some form of international regime for the seabed underlying the high seas were also made at the Geneva Conference on the Law of the Sea of 1958. Thus, the delegate of Monaco suggested the creation of an international organization as a consultive and advisory body, which would assist governments to conduct the exploitation of the seabed in conformity with the law of the sea. This suggestion, however, did not command further support.[434] The delegate of the Federal Republic of

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[433] U.N. Doc.A/CN.4/97, in (1956) I.L.C. Yearbook 9, (vol.II).

[434] United Nations Conference on the Law of the Sea, VI Official Records, (U.N. Doc.A/CONF.13/42), p. 18, (1958).

A more specific proposal envisioning the creation of an international agency empowered with the authority to grant exploitation permits to states, or private enterprises was advanced by a commentator. The proposed agency would function as an international registry office entrusted with the task of recording individual claims for exclusive exploitation in specified deep seabed areas. The entrepreneur would record his claim with his own country, which would subsequently notify the international agency that it intends to exercise jurisdiction over the enterprise in the specified area. The agency would have the power to issue a specific exploitation permit for that area and set a time limit during which exploitation must commence, at the risk of losing the permit. (L. F. E. Goldie, "The Geneva Conventions", in Lewis Alexander, The Law of the Sea, pp. 281-283, Ohio State University Press, 1967).

It may be noted that while this proposal has the (continued on next page.)

Germany made a proposal for the adoption of a body of rules to regulate the exploitation of the seabed under the high seas. He further suggested that the supervision of exploitation activities should be entrusted to the closest coastal state, which should act on behalf of the international community and that international agreements could be concluded between interested states in order to delimit the areas of supervision and to provide for the establishment of joint bodies vested with the authority to perform supervisory functions in place of the coastal states. This proposal was opposed by several delegations and was eventually abandoned.[435]

In 1966, the Dutch Branch of the International Law Association organized a Deep Seabed Mining Committee which suggested that a body of international law for the deep seabed could be developed and administered by an international agency.[436]

The trends towards the establishment of a legal regime for the orderly exploitation of the deep seabed and the rejection of any laissez faire system are also

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(continued from page 196)
advantage of securing exclusive state exploitation in the specified areas once a permit is granted, its implied operation on a first-come, first-served basis (prior in tempore, potior in jure), provides no means for resolving conflicts when two or more entrepreneurs are requesting permits for the same or for overlapping zones. Furthermore, the adoption of this system would confer great advantages on the developed countries which have the technological capability to engage in exploitation activities on the deep seabed.

[435] Ibid., pp. 125-126.

[436] International Law Association, Report of the Fifty-Second Conference, pp. 793, 797-798, (1967).

reflected in the Report of the United States Commission on Marine Science, Engineering and Resources which states:

> Unless a new international framework is devised which removes legal uncertainty from mineral resources, exploration and exploitation in every area of the sea-bed and its subsoil, some venturesome governments and private entrepreneurs will act to create faits accomplis that will be difficult to undo, even though they adversely affect the interests of the United States and the international community.[437]

The same trends are also evident in the following statement of President Johnson, in which it is implicitly suggested that a deep seabed regime should be so framed as to secure the exploitation of the deep seabed for the benefit of mankind as a whole:

> Under no circumstances, we believe, must we ever allow the prospect of rich harvest and mineral wealth to create a new form of colonial competition among the maritime nations. We must be careful to avoid a race to grab and hold the lands under the high seas. We must ensure that the deep seas and the ocean bottoms are, and remain the legacy of all human beings.[438]

4. Developments within the United Nations.

The initial impetus for the United Nations developments towards the establishment of a legal regime for the deep seabed was provided by the Economic and Social Council Resolution 1112 (XL), of March 7, 1966, which requested the Secretary General to survey the present state of knowledge in regard to the resources of the seabed beyond the continental shelf and of the techniques for exploiting them.[439] A report comprising a study of the mineral and food resources of the sea was submitted by the Secretary General in February, 1968.[440]

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[437] Our Nation and the Sea, (Report of the Commission on Marine Science, Engineering and Resources), p. 146, (Washington, D.C., 1969).

[438] 2 Weekly Compilation of Presidential Documents, pp. 930-931, (1966).

The aforementioned Resolution of the ECOSOC was also endorsed by General Assembly Resolution 2172 (XXI), of December 6, 1966, which further requested the Secretary General to formulate proposals for

> ...ensuring the most effective arrangements for an expanded program of international co-operation to assist in a better understanding of the marine environment through science, and in the development of marine resources.

To this end the Secretary General was requested to set up a group of experts to assist him in the preparation of the survey and proposals. The Report of the Secretary General was published in February, 1968.[441]

A more decisive initiative to bring into focus the problem of the regulation of the exploitation of the deep seabed resources was undertaken by Ambassador Arvid Pardo, permanent representative of Malta to the United Nations, who, on August 17, 1967, requested the inclusion of a supplementary item on the agenda of the twenty-second session of the General Assembly initiating the promulgation

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[439] ECOSOC Official Records, 40 Sess., Suppl.1, p. 3.

[440] U.N. Doc.E/4449 and Add.1 and 2: Resources of the Sea beyond the Continental Shelf.

[441] U.N. Doc.E/4487, Marine Science and Technology: Survey and Proposals.

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of a declaration and the conclusion of a treaty "concerning the reservation for peaceful purposes of the seabed and of the ocean floor, underlying the seas beyond the limits of national jurisdiction, and the use of these resources in the interests of mankind."[442]

This initiative was designed to stimulate action on internationalization of the deep seabed, before progressing technology made exploitation in the deep seabed feasible and resulted in a proliferation of national claims. In the accompanying memorandum, the Maltese Representative pointed out that in view of the rapidly increasing technological capability of the developed countries the deep seabed will become progressively and competitively subject to national appropriation and use, which is likely to result in the militarization of the deep seabed and in the exploitation of its resources for the advantage of technologically developed countries. He further recommended that the deep seabed be declared as the "common heritage of mankind" and that immediate steps be taken to draft a treaty embodying inter alia the following principles:

(1). The deep seabed is not subject to national appropriation.

(2). Its exploration shall be undertaken in a manner consistent with the Principles and Purposes of the Charter of the United Nations.

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[442] U.N. Doc.A/6695, (XXII), p. 1, (August 18, 1967).

(3). Its use and economic exploitation shall be undertaken with the aim of safeguarding the interests of mankind, and the accruing financial benefits shall be used primarily to promote the development of poor countries.

(4). The deep seabed shall be reserved exclusively for peaceful purposes.

He further proposed the creation of an international agency to assume jurisdiction over the deep seabed area and to ensure that all activities thereon are in conformity with the provisions of the proposed treaty.[443]

The immediate result of the Maltese proposal was the passage of General Assembly Resolution 2340 (XXII), on December 8, 1967, by which an Ad Hoc Committee consisting of 35 members was established, with the mandate to study the peaceful uses of the seabed beyond national jurisdiction and prepare a report which would include:

(1). A survey of the past and present activities of the United Nations and its specialized agencies with regard to the seabed and the ocean floor and of existing international agreements concerning these areas.

(2). An account of the scientific, technical, economic and legal aspects of the subject.

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[443] Ibid., pp. 1-2. It may be noted that the Maltese proposal has some affinities with the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and other Celestial Bodies, Article 1 of which provides:

> The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of mankind. (61 Am. J. Int. L. 644, (1967). The Treaty entered into force on October 10, 1967).

(3). An indication regarding practical means to promote international co-operation in the exploitation, conservation and use of the seabed and the ocean floor.

The Ad Hoc Seabed Committee held three sessions during 1968 and submitted a report[444] to the General Aseembly, which reflected emerging conflicts of interests between the developing and the developed countries, and indicated the failure of the Committee to reach agreement on a statement of principles with respect to the seabed question. The report contains an extensive review of technical, economic and legal problems but it does not recommend any of the draft proposals on a deep seabed regime submitted by various delegations.

This report was extensively discussed by the First Committee of the General Assembly during its twenty-third session. Although the discussions revealed a wide disarray of views with respect to the question of adopting a declaration of principles on the legal regime of the deep seabed, it was generally agreed that the problems relating to the seabed should be more thoroughly studied and discussed before any agreement could be reached.[445]

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[444] U.N. Doc.A/7230, August 30, 1968, Report of the Ad Hoc Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction.

[445] U.N. Doc.A/C.1/PV.1592, pp. 3-5, (October 31, 1968).

On the recommendation of the First Committee the General Assembly adopted on 24 December, 1968, four Resolutions, (2467A-D, XXIII), dealing with various aspects of the seabed issue.

Resolution 2467A established a permanent Seabed Committee of 42 members. After making clear that any exploitation of the deep seabed should take into account the special interests of the developing countries, this Resolution instructed the Seabed Committee to study the elaboration of legal principles which would promote international co-operation in the exploration and use of the seabed, and to ensure the exploitation of its resources for the benefit of mankind. It may be noted that this mandate was much more clearly oriented towards the elaboration of a regime for the deep seabed, than the one given to the Ad Hoc Seabed Committee. Like its predecessor, the Seabed Committee was also instructed to study the economic and technical aspects of the problem and to discuss the reservation of the deep seabed for peaceful purposes.

Resolution 2467B requested the Secretary General to undertake a study of measures that may be taken to protect against possible pollution arising from the exploration and exploitation of the seabed.

Resolution 2467C requested the Secretary General to undertake a study on the question of the establishment of an international machinery for the promotion of the exploration and exploitation of the seabed resources and their use in the interests of mankind. Resolution 2467D welcomed the concept of an International Decade of Ocean Exploration.

The seabed Committee worked during 1969 and made some progress in formulating a set of principles, but was unable at this stage to make any specific recommendations on substantive matters.[446]

In the same year the General Assembly adopted Resolution 2574B (XXIV) by which it invited the Seabed Committee to continue its work and urged it to complete a draft declaration of principles with respect to the deep seabed, for the General Assembly session in 1970.

A further development during the same session of the General Assembly was the adoption of Resolution 2574D (XXIV), which declared a moratorium on exploitation of the deep seabed, pending the establishment of an international regime, and concluded that no claims to any part of the deep seabed area shall be recognized. This Resolution was initiated by twelve developing countries and was strenuously opposed by the major industrialized countries.[447] It reflected the apprehensions of the developing countries that by the time some agreement on the deep seabed regime was reached, a large part of it would have been exploited and appropriated by those countries which had the capacity to do so.[448] It may be noted that the Resolution was not significant in practical terms, since the deep seabed had not been precisely defined, although it could, at least, bar any claims to submarine areas in the mid-ocean, which could not be substantiated even by extravagant interpretations of the "exploitability test" of the Geneva Convention on the Continental Shelf.[449]

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[446] U.N. Doc.A/7622, Report of the Committee on the Peaceful Uses of the Ocean Floor beyond the Limits of National Jurisdiction, par. 15.

[447] France, Japan, the United Kingdom, the U.S.A., and the U.S.S.R. voted against the Resolution.

The declaration on legal principles with respect to the deep seabed regime was eventually adopted by the Seabed Committee, upon the initiative of its Chairman, in November 1970.[450] This declaration resulted in General Assembly Resolution 2749 (XXV), of December 18, 1970, on the Declaration of Principles Governing the Seabed and Ocean Floor, and the Subsoil thereof, beyond the Limits of National Jurisdiction.[451]

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[448] See, e.g., the statement of the representatives of Cameroon, in U.N. Doc.A/C.1/PV.1675, p. 26, (November 3, 1969), of Trinidad and Tobago, in Doc.A/C.1/PV.1677, p. 13, (Novenber 5, 1969), and of Cyprus, in Doc.A/C.1/PV.1676, p. 76, (November 4, 1969).

[449] 499 U.N.T.S. 311, Article 1.

[450] U.N. Doc.A/C.1/PV.1773, pp. 17-20, (November 25, 1970).

[451] The Resolution was unanimously adopted, with 14 abstentions. See U.N. Doc.A/PV.1933, p. 96, (December 18, 1970).

This Resolution embodied all the most important points of the Maltese proposal.[452] Thus, it declared that the seabed beyond the limits of national jurisdiction is the common heritage of mankind and as such incapable of appropriation by individual states. It further provided that this area shall be used by all states exclusively for peaceful purposes, and that all activities regarding the exploration and exploitation of the resources therein shall be governed by the international regime to be established.[453] In pursuance to the "common heritage" concept the Resolution also declared that all activities in the deep seabed shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of states and taking into particular consideration the interests and needs of the developing countries.[454] The Resolution further declared that the legal regime to be established for the deep seabed

> ...shall provide for the orderly and safe development and rational management of the area and its resources and for expanding opportunities to ensure an equitable sharing in the benefits.[455]

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[452] Supra, n. 442.

[453] Pars. 4-5.

[454] Par. 7.

[455] Par. 9.

The Resolution further imposed the duty upon states and international organizations to ensure that activities carried on in the deep seabed shall be in conformity with the international regime to be established.[456]

It may be noted that although the Resolution does not pronounce any binding legal principles, it nonetheless embodies some political guidelines which the community of states has undertaken to follow in good faith in the elaboration of a legal regime for the deep seabed. The "common heritage of mankind" concept, in particular, implies that the legal regime to be adopted should safeguard the interests of mankind as a whole.

5. State Proposals for a Deep Seabed Legal Regime Submitted to the Seabed Committee.

Virtually all state proposals regarding the establishment of a legal regime for the deep seabed, which were submitted to the Seabed Committee, favour the creation of an international regime and an international machinery for its implementation. The proposals are also so framed as to conform with the general political directives of the aforementioned General Assembly Resolution on the Declaration of Principles governing the deep seabed. In particular the "common heritage" concept forms the basis of all proposals, which spell out in various ways this concept's legal characteristics and implications.

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[456] Par. 14.

This unanimity in regard to the establishment of an international legal regime, however, does not extend to the question of the nature of the basic structure and organization that should be accorded to the international machinery, and particularly to the question whether the international machinery should function as a mere regulatory agency, entrusted with the task of registering state claims to the seabed and issuing exploitation licences to states and private enterprises upon the payment of a royalty, or as an economically independent and centrally organized body, empowered with the authority to conduct directly the exploitation of the seabed.

In regard to the scope and functions of the international machinery, a considerable divergence of opinion exists between the developing and the developed industrialized countries. The developing countries maintain that the international machinery should be vested with the exclusive right to exploit the deep seabed on behalf of the community of states, whereas the industrialized countries favour exploitation by individual states, on the payment of a royalty to the international machinery.

The proposals submitted by the developed countries, while they accept the idea that the seabed beyond the limits of national jurisdiction is the common heritage of mankind and acknowledge the need that it should be exploited for the benefit of all states, they nevertheless fail to provide the institutional basis for the achievement of these goals. It would rather appear that these proposals serve the interests of the technologically advanced countries.

Thus, the United States proposal [457] provides for the creation of an International Seabed Resource Authority vested with the power to issue exploitation licences to states, or natural or juridical persons under their authority or sponsorship, on the payment of fees.[458] The Authority would consist of an Assembly to which all states would be members, a Council of twenty-four members, a Secretariat subordinate to the Council, and a Tribunal for settlement of disputes. The Council would be the dominant body of the Authority with most powers of initiative, both legislative and executive. Six of its members would be the most industrially advanced countries and its decisions would require the separate simple majorities of the other eighteen members, which are elected by the Assembly, and of the six industrialized countries.[459] The Assembly is virtually deprived of any initiative. It does not even have the power to initiate and propose budgets but only to approve them, or return them to the Council for reconsideration and resubmission.[460]

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[457] U.N. Doc.A/AC.138/25, August 3, 1970.

[458] Ibid., Articles 10, 13, 14.

[459] Ibid., Articles 36, 39, 40.

It may be noted that this proposal is tailored for the needs of the industrialized countries. In the first place, its basic character as a licensing system under a weak Authority, whose task is confined in the selection of the prospective exploiters, ensures to industrialized countries exclusive access to the seabed, since they are the only states possessing the necessary economical and technological means for deep seabed exploitation. Furthermore, the cumulation of all esential powers in the Council and the adoption of the separate majorities system in the decision-making process of this body enables the industrialized countries to control all the important activities of the Authority.

Basically on the same lines are also the proposals of the United Kingdom,[461] France,[462] and the U.S.S.R.[463] all of which adopt a licensing system. According to the Soviet proposal, decisions of the Council on questions of substance should be taken by agreement of all members.

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[460] Article 35(f).

[461] U.N. Doc.A/AC.138/26, August 3, 1970.

[462] U.N. Doc.A/AC.138/27, August 4, 1970.

[463] U.N. Doc.A/AC.138/43, July 22, 1971.

In favouring a strong international machinery with comprehensive powers, the developing countries cherish the hope that the co-operative exploitation of the deep seabed will help rectify the economical and technological imbalance between themselves and the developed countries. In their view, the seabed regime to be established should provide not only for an equitable distribution of benefits,[464] but also for an equitable participation in the system of management and distribution. In this respect the proposals of the developing countries stress the sharing of managerial prerogatives and decision making power. Their great expectations from the exploitation of the deep seabed are based not so much on revenue sharing, at least during the first stages of production, as on the political control of such exploitation, with the objestive of ensuring their participation in it and accelerating the transfer of essential technology.

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[464] The United Nations Secretary-General suggested, in a report, some criteria for the distribution of benefits. He was of opinion that during the first stages of production, when the net income of the international machinery will be small, it might be expedient to concentrate the available profits in some high priority programs, such as the promotion of development in the least developed countries. (Report of the Secretary-General, "Possible Methods and Criteria for the sharing by the International Community of Proceeds and other Benefits derived from the Exploitation of the Area beyond the Limits of National Jurisdiction", U.N. Doc.A/AC.138/38, pp. 14 ff., (15 June, 1971).

In conformity with the General Assembly Resolution on the Declaration of Principles concerning the regime of the deep seabed,[465] which states that the exploitation of the deep seabed resources should be carried out for the benefit of mankind as a whole, taking into particular consideration the interests and needs of the developing countries, these latter countries seek to achieve a balance between the need to attract capital and the need to ensure that deep seabed exploitation benefits mankind as a whole. Although they realize that the proposed strong international machinery might not be able to participate directly in the exploration and exploitation of the deep seabed immediately, they believe that it will be able to do so later, once the necessary technology had been acquired and large capital accumulated. In the view of the Mexican delegate at the Seabed Committee

> (t)he international community, as the owner of the area and its resources, has the right to share directly in their development until it acquires the technical and financial means to exploit them by and for itself. There is nothing to justify a system of operating permits which would assign to the legitimate owner the role of mere spectator.[466]

The developing countries also support the initiation by the international machinery of an international system of production and price controls in order to avoid any adverse impact of deep seabed mineral production on land exploitation of the same resources and safeguard the interests of those countries which depend on mineral production for their export earnings.[467] In this respect, the aforementioned Resolution 2749 (XXV), on the Declaration of Principles governing the deep seabed, noted:

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[465] General Assembly Resolution 2749 (XXV), December 18, 1970.

[466] U.N. Doc.A/AC.138/SC.1/SR.40, p. 8, March 25, 1972.

> ...the development and use of the area and its resources shall be undertaken in such a manner as to foster the healthy development of the world economy and balanced growth of international trade, and to minimize any adverse economic effects caused by fluctuation of prices of raw materials resulting from such activities.

The need for the initiation of such measures was also acknowledged by General Assembly Resolution 2750A (XXV), which requested the Secretary-General to:

(1). Identify the problems arising from the production of certain minerals from the area beyond the limits of national jurisdiction and examine the impact they will have on the economic well being of the developing countries, in particular, on prices of mineral exports on world market.

(2). Study these problems in the light of the scale of possible exploitation of the seabed, taking into account the world demand for raw materials and the evolution of costs and prices.

(3). Propose effective solutions for dealing with these problems.

The Secretary-General recommended in his report some "compensatory financing by the international machinery to minimize the effects of possible decline in export resources on the economy of the few developing countries which might be affected",[468] and suggested that developing countries be allowed to purchase at least part of their imported oil from the international machinery at the same prices which are offered to large-scale buyers of the industrialized countries.[469]

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[467] See, e.g., the views of the representative of Ceylon, in U.N. Doc.A/138/SC.1/SR.43, p. 15, (March 27, 1972), and the representative of Kuwait, ibid., at p. 22.

The proposal for a deep seabed regime submitted to the Seabed Committee by Tanzania[470] envisions the establishment of a strong international machinery empowered with the authority to explore and exploit the deep seabed by means of its own facilities and equipment and to equitably distribute raw materials and other benefits to individual states. The machinery is also vested with the discretionary right to grant exploitation licences to states or to private enterprises, subject to such terms and conditions as the machinery might determine. The proposal also suggests the initiation of measures designed to minimize and eliminate fluctuation of prices in land based mineral production

The Latin American proposal, placed before the Seabed Committee by thirteen Latin American countries,[471] forms the antithesis of most of the proposals submitted by the developed countries, in that it gives all powers of initiative to the international machinery and rejects the idea of licensing as incompatible with the "common heritage of mankind" concept. The proposal further provides that the international machinery in exploiting the deep seabed may avail itself of the services of states or private enterprises by a system of contracts or by the establishment of joint ventures.

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[468] U.N. Doc.A/AC.138/36, p. 56, (May 28, 1971).

[469] Ibid., pp. 44, 64.

[470] U.N. Doc.A/AC.138/33, (July 20, 1971).

[471] U.N. Doc.A/AC.138/49, (August 10, 1971).

A compromising proposal was submitted by Malta,[472] which appears to support a mixed regime of licensing and direct exploitation by the international machinery. The proposal expands the concept of common heritage to comprise both the seabed and the superjacent waters.

An also compromising proposal, which remains equidistant from the positions respectively taken by the developed and the developing countries, was submitted by Canada.[473] The proposal consists of a seriatim consideration of the fifteen paragraphs of the General Assembly Resolution 2749 (XXV) on the Declaration of Principles governing the deep seabed. Its compromising character lies in the combination of state initiative in the exploitation of the seabed with the imposition of control measures on production, marketing and distribution of seabed products. Thus, Canada suggested the establishment of a weak licensing international machinery empowered with supervising authority. The supreme organ of the proposed machinery is the Assembly, which elects the members of the executive body (Council). The decisions of both these bodies are to made on a basis of a two-thirds majority vote. In this respect, the proposal disapproves of the idea of weighted voting or double majorities. The proposal further provides for transitional arrangements aiming at the gradual accumulation of all exploitation rights in the international machinery, which would eventually conduct directly the exploitation of the seabed. This process is to be assisted by an international development fund made up of voluntary contributions from states with income from the exploitation of their own continental shelves.

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[472] U.N. Doc.A/AC.138/53, (August 5, 1971).

[473] U.N. Doc.A/AC.138/59, (August 24, 1971).

6. The Draft Articles on the Deep Seabed Regime Prepared by the Third United Nations Conference on the Law of the Sea.

The most recent Draft of Articles on the deep seabed regime prepared by the Third United Nations Conference on the Law of the Sea is contained in Part XI of the Informal Composite Negotiating Text, which was prepared by this Conference during its sixth session in 1977.[474]

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[474] U.N. Doc.A/CONF.62/WP.10. See also supra, n. 293.

This Text adopts the general principles enunciated in General Assembly Resolution 2749 (XXV) on the Declaration of Principles governing the deep seabed. Thus, it provides that the deep seabed is the common heritage of mankind and that its use shall be reserved exclusively for peaceful purposes and its exploitation shall be carried out for the benefit of mankind as a whole.[475]

It is also provided that the character of the waters superjacent to the deep seabed area as high seas, and the legal status of the airspace above these waters are not affected.[476] It may be noted that the freedom of the high seas in regard to these waters comprises also the freedom of fishing, since the landward limit of the deep seabed area is at least 200 miles distant from the coast and, therefore, beyond the 200-mile fishing zone.[477]

As regards the international machinery for the implementation of the deep seabed regime envisioned in the Text, this Text provides for the establishment of an

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[475] Ibid., Articles 136, 137, 140, 141.

[476] Ibid., Article 135.

[477] This can be gathered from a combined interpretation of Articles 1(1) and 76 of the Text. Article 1(1) provides that the deep seabed area, which is named "the Area", comprises "the seabed and ocean floor and the subsoil thereof beyond the limits of national jurisdiction." Article 76 provides that the continental shelf extends to a distance of 200 miles from the baselines from which the width of the territorial sea is measured, or even further, in cases where the coastal state's continental margin (i.e. the geographical continental shelf, slope and rise) extends beyond that distance.

International Seabed Authority, which is entrusted to carry out all activities in the Area on behalf of mankind as a whole.[478] The principal organs of the Authority are the Assembly, the Council and the Secretariat.[479]

The Assembly is the supreme organ of the Authority and consists of all states members of the Authority. States are represented in the Assembly on an equal basis, each state having one vote. This organ is empowered to establish the general policies of the Authority on any question or matter within the latter's competence. Its decisions on questions of substance are taken by a two-thirds majority vote of the members present and voting, provided that such majority includes the simple majority of the members participating in that session of the Assembly, whereas decisions on procedural matters are taken by a simple majority of the members present and voting.[480]

The Council is the executive organ of the Authority, consisting of 36 members, all of which are elected by the Assembly in the order provided in Article 159 of the Text. It would appear from the special provisions of this Article that at least 10 of the Council's members have to be elected from among the industrialized countries.

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[478] Supra, n. 474, Articles 151, 154.

[479] Ibid., Article 156(1).

[480] Ibid., Articles 157(5-7), 158.

In Article 159(2) the Text further provides that the Assembly shall ensure that land-locked and geographically disadvantaged states are represented in the Council to a degree proportionate to their representation in the Assembly. Article 159(e) provides that the election of eighteen members of the Council should be made with a view of ensuring an equitable geographical distribution of seats in this organ. For this purpose one seat is to be reserved for each of the following geographical regions: Africa, Asia, Eastern Europe (Socialist), Latin America, and Western Europe and others.

Each member of the Council has one vote and decisions on questions of substance are taken by a three-fourths majority of the members present and voting, provided that in this majority the simple majority of the members participating in the same session of the Council is also included. Decisions on procedural matters are taken by the simple majority of the members present and voting.[481]

The Council is vested with the power to establish the specific policies of the Authority on any matter within the latter's competence, in conformity with the general policies which are established by the Assembly.[482] The Council is assisted by an Economic Planning Commission, a Technical Commission, and a Rules and Regulations Commission.[483]

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[481] Ibid., Article 159.

[482] Ibid., Article 160(1).

The Secretariat is presided by the Secretary-General who is appointed by the Assembly upon the recommendation of the Council. The Secretary-General is to attend all meetings of the Assembly and the Council and perform any functions entrusted to him by any organ of the Authority.[484]

The preceding outline of the decision-making system of the Authority indicates that the Text secures a basically equal representation of all states in both the Assembly and the Council. While real power resides in the Assembly, whose decisions reflect the wishes of a two-thirds majority of states, the Council is entrusted to initiate the specific policies of the Authority. The composition and voting system of the Council and, particularly, the requirement of a three-fourths majority for decisions of substance, balance sufficiently the interests of the various geographical and economic groups, which are comprehensively represented, and facilitate the achievement of acceptable solutions. It should be born in mind that no geographical or economic group represents a sufficient amount of votes to form a three-fourths majority and, therefore, a compromise between the different interest groups would be indispensable in order to take a decision.

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[483] Ibid., Articles 161-164.

[484] Ibid., Article 165.

The Text adopts the system of direct exploitation of the Seabed by the Authority.[485] In order to implement this system the Text further provides for the establishment of a special organ, the Enterprise,"through which the Authority shall directly carry out activities in the Area."[486] The Enterprise is under the direct control of the Council and its members are appointed by the Assembly upon the recommendation of the Council.[487]

The Authority is also vested with the discretionary right to conduct the exploitation of the seabed in association with states or private enterprises, if they undertake by contract or other arrangements to provide the necessary technological and financial means.[488] Such contracts may provide for joint arrangements between the contractor and the Authority, such as joint exploitation with production sharing, service contracts, or any other form of joint ventures.[489]

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[485] Ibid., Article 151(1).

[486] Ibid., Article 156(2).

[487] Ibid., Articles 158(2)(iv), 160(2)(ix).

[488] Ibid., Article 151(2)(ii).

[489] Ibid., Annex II, (Basic Conditions of Exploration and Exploitation), Article 5(i).

Since technology is a sine qua non condition for the exploitation of the seabed, the Text lays special emphasis on the problem of the transfer of technology. Thus, it provides that the Authority and its constituent states members shall co-operate for the dissemination of scientific knowledge and the transfer of technology relating to activities in the Area, for the benefit of the Enterprise and all states.[490] In cases of joint ventures between the Authority and states or private enterprises on the basis of contractual arrangements, the Authority may require that the contractor make available to the Enterprise the same technology which is employed in the contractor's activities in the seabed, on fair and reasonable terms.[491]

The highly centralized and strong international machinery proposed in the Text would seem to respond to the idea that the seabed beyond national jurisdiction is the common heritage of mankind. This machinery's independent capability as an intergovernmental organization and a business enterprise empowered with the exclusive right to conduct all activities in the deep seabed, offers sufficient guarantees that the exploitation of the deep seabed will be carried out for the benefit of all states.

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[490] Ibid., Article 144.

[491] Ibid., Annex II, Article 5(j)(vi).

CHAPTER VIII

CONCLUSION

The legal problems of the continental shelf may have arisen out of a situation created by the rapid pace of technological progress and by the ever growing needs of mankind. The rights to the continental shelf conferred upon the coastal state and the concomitant seaward expansion of national jurisdiction have been prompted by the need of the coastal states to secure for themselves increasing reserves of food and minerals in the face of endless industrial demands to feed and serve rapidly increasing populations. The same reasons urged the establishment of a 200-mile fishing zone and gave impetus to discussions on the cognate concept of the economic zone.

In view of the immense potential of the oceans as a source of wealth and the ever intensifying and diversifying use and exploitation of the marine environment, the need to reconcile the traditional uses of the sea with the exclusive rights of the coastal states and work out a harmonious relationship between them becomes more urgent. In this respect, it is worth noting that the exploitation of the continental shelf and the initiation of conservation measures within the 200-mile fishing zone, as well as the proposed exploitation of the deep seabed by an international machinery, do not encroach upon the traditional freedoms of the high seas.

The principle of the freedom of the high seas should not be regarded as an uncompromising and rigid dogma, inflexible to reasonable requirements of economic life and scientific progress. It should be born in mind that the exploration and exploitation of the seabed and the initiation of conservation measures for the living resources of the high seas were outside the realm of practical possibilities when the principle of the freedom of the high seas became part of international law. This principle originated as a reaction against claims to sovereignty over the high seas, which endangered the freedom of navigation.[492] Hugo Grotius, in advocating the freedom of the seas early in the 17th century, was mainly concerned with freedom of navigation and fishing. His assumption that the living resources of the sea are inexhaustible is now patently obsolete, in view of the grave problem of rapidly decreasing fishery resources, which resulted from uncontrolled and destructive exploitation.

There appears to be nothing in the nature of the activities regarding the exploration and exploitaiton of the seabed to endanger the freedoms of navigation, fishing and the laying of submarine cables and pipelines. If some interference with these freedoms might be unavoidable, it should and can be reduced to a minimum in order that the multiple uses of the high seas may co-exist harmoniously.

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[492] Philip C. Jessup, The Law of Territorial Waters and Maritime Jurisdiction, p. 4, (New York, 1927). See also Memorandum on the Regime of the High Seas, prepared by the United Nations Secretariat, U.N. Doc.A/CN.4/32, (14 July, 1950), in (1950) I.L.C. Yearbook 67, at 113, (vol. II).

It should be noted, however, that a viable order in the marine environment cannot be achieved only through the accommodation of the rights of the coastal states with the traditional freedoms of the high seas. The nature of the oceans and their present and foreseeable uses emphasize interdependence between national interests and point to the need of co-operative state action. International co-operation is necessary for the effective prevention and control of marine pollution and for the conservation and management of the living resources of the high seas. It should be borne in mind that important fisheries overlap national boundaries and cannot be managed in a regime of exclusive sovereignty.

While the Geneva Convention on the Continental Shelf balances equitably the exclusive rights of the coastal state with the inclusive rights of the international community, it does not provide a precise criterion for the delimitation of the seaward limit of the continental shelf. The open-ended standard of the exploitability test, embodied in Article 1 of this Convention, was in fact an interim definition which was dependent on the state of technology at the time of the drafting of the Convention and can no longer serve as a basis for delimiting the seaward limit of the continental shelf, in view of the fact that at present exploitation of the seabed is technologically feasible even in the mid-ocean.

It should be emphasised in this respect that the acceptability of a continental shelf definition depends primarily on the nature of the regime to be adopted for the seabed beyond the limits of national jurisdiction. The institution of a strong and independent international machinery, empowered with the authority to conduct directly the exploitation of the deep seabed, could induce coastal developing countries to restrain their claims to the seabed in the immediate vicinity of their coasts. Developed countries,however, seem to reject the idea of a strong international machinery, but they appear willing to accept a narrow continental shelf, if the international machinery to be established allows individual states to exploit directly the seabed, on the payment of fees.

As regards the nature of the criterion to be applied for the delimitation of the outer boundary of the continental shelf, it may be noted that the basis of a fixed distance from the coast, rather than the basis of water depth, appears to provide more guarantees for an equal treatment of all states, inasmuch as the area of continental shelf which would be alloted to each coastal state under the former basis would be proportional to the length of its coastline and independent of the existence of a continental shelf in the geographical sense. In this respect, it may be noted that a distance of 200 miles from the coast, which is actually the basic criterion proposed by the Third United Nations Conference on the Law of the Sea, seems appropriate.[493]

In regard to the seabed beyond the limits of national jurisdiction, it may be noted that the declaration of this area as the common heritage of mankind[494] inaugurates a new era in international relations, which could have a profoundly positive influence on the current state of international affairs, especially between developed and developing countries. The establishment of a legal regime for this area in conformity with the general directives and principles enunciated by the United Nations General Assembly[495] and the institution of a comprehensive international seabed machinery which will remain under the exclusive and direct control of the community of states will best guarantee that the exploitation of the deep seabed will be conducted for the benefit of mankind.

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[493] Supra, n. 474, Article 76.

[494] General Assembly Resolution 2749 (XXV), of December 17, 1970.

[495] Ibid.

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